No. 18-96	
Title:	**Tennessee Wine and Spirits Retailers Association, Petitioner** **v.** **Zackary W. Blair, Interim Director of the Tennessee Alcoholic Beverage Commission, et al.**
Docketed:	July 20, 2018
Linked with 17A1186	
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(17-5552)
Decision Date:	February 21, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 24 2018	Application (17A1186) to extend the time to file a petition for a writ of certiorari from May 22, 2018 to July 21, 2018, submitted to Justice Kagan. **Main Document** **Lower Court Orders/Opinions**
Apr 26 2018	Application (17A1186) granted by Justice Kagan extending the time to file until July 21, 2018.
Jul 20 2018	Petition for a writ of certiorari filed. (Response due August 20, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Aug 14 2018	Waiver of right of respondent Clayton Byrd, Executive Director of the Tennessee Alcoholic Beverage Commission to respond filed. **Main Document**
Aug 16 2018	Brief of respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More in opposition filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Waiver of right of respondent Affluere Investments, Inc. to respond filed. **Main Document**
Sep 04 2018	Reply of petitioner Tennessee Wine and Spirits Retailers Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	DISTRIBUTED for Conference of 9/24/2018.

Sep 27 2018	Petition GRANTED.
Oct 12 2018	Blanket Consent filed by Petitioner, Tennessee Wine and Spirits Retailers Association. **Blanket Consent**
Oct 16 2018	Blanket Consent filed by Respondent, Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More. **Blanket Consent**
Oct 26 2018	Blanket Consent filed by Respondent, Affluere Investments, Inc.. **Blanket Consent**
Oct 30 2018	Blanket Consent filed by Respondent, Clayton Byrd, Executive Director of the Tennessee Alcoholic Beverage Commission. **Blanket Consent**
Nov 13 2018	Brief of petitioner Tennessee Wine and Spirits Retailers Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 13 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service** **Other**
Nov 13 2018	Letter of respondent Clayton Byrd, Executive Director of the Tennessee Alcoholic Beverage Commission filed. **Main Document**
Nov 16 2018	Amicus brief of KHBC PARTNERS II, LTD. not accepted for filing. (November 20, 2018 - Corrected version submitted)
Nov 16 2018	Brief amicus curiae of Michigan Beer and Wine Wholesalers Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 16 2018	Brief amicus curiae of KHBC Partners II, Ltd. filed. (11/16/2018) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Nov 19 2018	Brief amicus curiae of Wine and Spirits Wholesalers of Tennessee, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of Open Markets Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of Center for Alcohol Policy filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of Consumer Action filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of Wine and Spirits Wholesalers of America, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of National Beer Wholesalers Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 20 2018	Brief amici curiae of National Conference of State Legislatures, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Amicus brief of Major Brands, Inc. not accepted for filing. (November 30, 2018- Corrected version submitted)
Nov 20 2018	Brief amicus curiae of American Beverage Licensees filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amici curiae of Illinois, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amici curiae of U.S. Alcohol Policy Alliance, et al. filed. (Corrected version submitted.)
Nov 20 2018	Brief amici curiae of National Alcohol Beverage Control Association, and National Liquor Law Enforcement Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amicus curiae of Major Brands, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	Brief amici curiae of U.S. Alcohol Policy Alliance, et al. filed. (December 13, 2018) **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 28 2018	SET FOR ARGUMENT ON Wednesday, January 16, 2019
Nov 30 2018	CIRCULATED
Dec 11 2018	Record requested from the U.S.C.A. 6th Circuit.
Dec 12 2018	Brief amicus curiae of Alan B. Morrison filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2018	Brief of respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Dec 13 2018	Brief of respondent Affluere Investments, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 17 2018	Joint motion for divided argument filed by respondents Affluere Investments, Inc. and Tennessee Fine Wines & Spirits, LLC. **Main Document** **Proof of Service**
Dec 17 2018	Motion of Illinois, et al. for leave to participate in oral argument as amici curiae and for divided argument filed. **Main Document** **Proof of Service**
Dec 18 2018	Record received from the U.S.C.A. 6th Circuit is electronic.
Dec 18 2018	Brief amici curiae of 81 Wine Consumers filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2018	Brief amici curiae of Law and Economics Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2018	Brief amicus curiae of Retail Litigation Center, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2018	Brief amicus curiae of Pacific Legal Foundation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2018	Brief amicus curiae of Law Professors in support of respondent Affluere Investments, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2018	Brief amicus curiae of National Association of Wine Retailers filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2018	Brief amicus curiae of Cato Institute filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 04 2019	Motion of Illinois, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
Jan 04 2019	Motion for divided argument filed by respondents DENIED.
Jan 04 2019	Reply of petitioner Tennessee Wine and Spirits Retailers Association filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2019	Argued. For petitioner: Shay Dvoretzky, Washington, D. C.; and David L. Franklin, Solicitor General, Chicago, Ill. (for Illinois, et al., as amici curiae.) For respondents: Carter G. Phillips, Washington, D. C.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Shay Dvoretzky Counsel of Record	Jones Day 51 Louisiana Avenue NW Washington, DC 20001-2113 sdvoretzky@jonesday.com	2028793474
Party name: Tennessee Wine and Spirits Retailers Association		
Attorneys for Respondents		
Michael Eugene Bindas Counsel of Record	Institute for Justice 600 University Street Suite 1730 Seattle, WA 98101 mbindas@ij.org	2069571300
Party name: Affluere Investments, Inc.		
Carter G. Phillips Counsel of Record	Sidley Austin LLP 1501 K Street, N.W. Washington, DC 20005 cphillips@sidley.com	+1 202 736 8270
Party name: Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More		
Joseph F. Whalen III Counsel of Record	Attorney General's Office P.O. Box 20207 Nashville, TN 37202 joe.whalen@ag.tn.gov	615-741-3499
Party name: Zackary W. Blair, Interim Director of the Tennessee Alcoholic Beverage Commission		
Sarah Keeton Campbell	Special Assistant to the Solicitor General and the Attorney General War Memorial Building 301 6th Avenue North Nashville, TN 37243 Sarah.Campbell@ag.tn.gov	(615) 532-6026
Party name: Zackary W. Blair, Interim Director of the Tennessee Alcoholic Beverage Commission		
William James Murphy	Zuckerman Spaeder LLP 100 East Pratt Street Suite 2440 Baltimore, MD 21202 wmurphy@zuckerman.com	410-332-0444
Party name: Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More		
Other		

Miguel A. Estrada Counsel of Record	Gibson, Dunn & Crutcher LLP 1050 Connecticut Ave., N.W. Washington, DC 20036 mestrada@gibsondunn.com	202-955-8500

Party name: Wine and Spirits Wholesalers of America, Inc.

Harry Arthur Herzog Counsel of Record	Herzog & Carp 427 Mason Park Blvd. Katy, TX 77450 hherzog@hcmlegal.com	7137817500

Party name: KHBC PARTNERS II, LTD.

Scott A. Keller Counsel of Record	Baker Botts LLP 1299 Pennsylvania Ave., NW Washington, DC 20004 scott.keller@bakerbotts.com	2026397700

Party name: American Beverage Licensees

Anthony S. Kogut Counsel of Record	Willingham & Cote 333 Albert Ave. Suite 500 East Lansing, MI 48823 akogut@willinghamcote.com	517-351-6200

Party name: Michigan Beer and Wine Wholesalers Association

David A. Balto Counsel of Record	Law Offices of David Balto 1325 G Street, NW Suite 500 Washington, DC 20005 david.balto@dcantitrustlaw.com	2025775424

Party name: Consumer Action

Rachel Sarah Bloomekatz Counsel of Record	Gupta Wessler PLLC 1900 L Street, NW, Suite 312 Washington, DC 20036 rachel@guptawessler.com	2028881741

Party name: National Alcohol Beverage Control Association, National Liquor Law Enforcement Association

Jeremy Michael Bylund Counsel of Record	King & Spalding, LLP 1700 Pennsylvania Avenue, NW Washington, DC 20006 jbylund@kslaw.com	(202) 626-5455

Party name: Law Professors

John Laughlin Carter Counsel of Record	Carter Hayes LLC 4115 Annandale Road Suite 205 Annandale, VA 20036 jlaughlinc@gmail.com	7036587737

Party name: Open Markets Institute

Paul D. Clement
Counsel of Record
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Party name: National Association of Wine Retailers

Kelsi Brown Corkran
Counsel of Record
Orrick, Herrington & Sutcliffe LLP
1152 15th Street NW
Washington, DC 20005
202-339-8497
kcorkran@orrick.com

Party name: Retail Litigation Center, Inc.

Allison L. Ehlert
Counsel of Record
Ehlert Appeals
P.O. Box 1024
El Cerrito, CA 94530
415-828-5350
allison@ehlertappeals.com

Party name: U.S. Alcohol Policy Alliance, et al.

David Leigh Franklin
Counsel of Record
Office of the Attorney General of Illinois
100 W. Randolph
12th floor
Chicago, IL 60601
3128145376
dfranklin@atg.state.il.us

Party name: Illinois, 34 States, and the District of Columbia

Andrew Michael Grossman
Counsel of Record
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
2028611697
agrossman@bakerlaw.com

Party name: Law and Economics Scholars

Henry Edward Hildebrand III
Counsel of Record
150 Fourth Avenue, North
Suite 1820
Nashville, TN 37219
615-810-8777
hhildebrand@fpwlegal.com

Party name: Wine and Spirits Wholesalers of Tennessee, Inc.

Deborah Joyce La Fetra
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
DLaFetra@pacificlegal.org

Party name: Pacific Legal Foundation

Michael D. Madigan
Counsel of Record
Madigan, Dahln & Harlan, P.A.
222 South Ninth Street
Suite 3150
Minneapolis, MN 55402
612-604-2000
madigan@mdh-law.com

Party name: NATIONAL BEER WHOLESALERS ASSOCIATION

Alan B. Morrison
Counsel of Record

George Washington Law School
2000 H Street NW
Washington, DC 20052

2029947120

abmorrison@law.gwu.edu

Party name: Alan B. Morrison

John Cowles Neiman Jr.
Counsel of Record

Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, AL 35203

2052541228

jneiman@maynardcooper.com

Party name: Center for Alcohol Policy

Ilya Shapiro
Counsel of Record

Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001

2028420200

ishapiro@cato.org

Party name: Cato Institute

Richard A. Simpson
Counsel of Record

Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006

202-719-7314

rsimpson@wileyrein.com

Party name: NATIONAL CONFERENCE OF STATE LEGISLATURES, et al.

James Alexander Tanford
Counsel of Record

Epstein Cohen Seif & Porter LLP
50 S. Meridian St
Suite 505
Indianapolis, IN 46204

812-332-4966

tanford@indiana.edu

Party name: 81 Wine Consumers

Richard B. Walsh Jr.
Counsel of Record

Suite 2500
600 Washington Ave.
St. Louis, MO 63101

314-444-7600

rwalsh@lewisrice.com

Party name: Major Brands, Inc.

No. 18-___

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Avenue North,
Suite 340-M
Nashville, TN 37201

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Tennessee Wine and Spirits Retailers Association. Petitioner is not the subsidiary or affiliate of any publicly owned corporation. No publicly owned corporation owns 10% or more of Petitioner's stock.

Respondents are Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More; and Affluere Investments, Inc., d/b/a Kimbrough Fine Wine & Spirits.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT 6

REASONS FOR GRANTING THE WRIT 16

I. THE COURTS OF APPEALS ARE DIVIDED 17

A. The Fifth and Sixth Circuits Have Struck Down Durational-Residency Requirements. 17

B. The Eighth Circuit Has Upheld Durational-Residency Requirements 19

C. Applying the Same Approach as the Eighth Circuit, the Second and Fourth Circuits Have Upheld Other Residency-Related Restrictions on Retailers and Wholesalers 21

II. THE QUESTION PRESENTED MERITS THE COURT'S ATTENTION 23

TABLE OF CONTENTS
(continued)

Page

III. THE SIXTH CIRCUIT'S DECISION IS WRONG 27

CONCLUSION 32

APPENDIX A: Opinion of the U.S. Court of Appeals for the Sixth Circuit (February 21, 2018) 1a

APPENDIX B: Opinion and Order of the U.S. District Court, M.D. Tenn. (April 14, 2017) 57a

TABLE OF AUTHORITIES

Page(s)

CASES

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 25

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009) 12, 21, 22, 26

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) ..... *passim*

Brooks v. Vassar,
462 F.3d 341 (4th Cir. 2006) 12, 21, 22, 23

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 29, 31

Cooper v. McBeath,
11 F.3d 547 (5th Cir. 1994) 17

Cooper v. Tex. Alcoholic Beverage Comm'n,
820 F.3d 730 (5th Cir. 2016) ..... *passim*

Cty. of Maricopa v. Lopez-Valenzuela,
135 S. Ct. 2046 (2015) 25

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

Jelovsek v. Bredesen,
545 F.3d 431 (6th Cir. 2008) 8

North Dakota v. United States,
495 U.S. 423 (1990) 25

Packingham v. North Carolina,
137 S. Ct. 1730 (2017) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Southern Wine & Spirits v. Div. of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) ..... *passim*

State Bd. of Equalization v. Young's Mkt. Co.,
299 U.S. 59 (1936) 28

Sveen v. Melin,
138 S. Ct. 1815 (2018) 25

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. XXI, § 2 ..... 3, 27

U.S. Const. art. 1, § 8, cl.3 ..... 4, 27

28 U.S.C. § 1254 3

47 Pa. Stat. Ann.
§§ 4-403, 4-410, 4-431, 4-432 24

235 Ill. Comp. Stat. 5/6-29.1 24

Ark. Code Ann. § 3-4-606 24

Cal. Bus. & Prof. Code § 23366.2 25

Ga. Code Ann. § 3-4-23 24

Idaho Code Ann. § 23-304 24

Ind. Code Ann. § 7.1-3-21-5 24

Kan. Stat. Ann. § 41-311 24

Ky. Rev. Stat. Ann. § 243.100 24

La. Stat. Ann. § 26:80 24

Md. Code, Alcoholic Beverages, § 3-102 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Me. Rev. Stat. tit. 28-A, § 1401 24
Mich. Comp. Laws Ann. §436.1601 24
Miss. Code. Ann. § 67-3-21 24
Mo. Rev. Stat. § 311.060.2 ..... 19, 24
Mo. Rev. Stat. § 311.060.3 19
N.H. Rev. Stat. Ann. § 178:1 24
N.Y. Alco. Bev. Cont. Law §§ 100, 102 ..... 21, 25
Okla. Stat. Ann. tit. 37, § 527 24
S.C. Code Ann. § 61-6-110 24
Tenn. Code Ann. § 57-3-201 8
Tenn. Code Ann. § 57-3-203 24
Tenn. Code Ann. § 57-3-204 ..... *passim*
Tenn. Code Ann. § 57-3-404 8
Tex. Alco. Bev. Code Ann. § 6.03 24
Tex. Alco. Bev. Code Ann. § 109.53 17
Va. Code Ann. § 4.1-222 24
Va. Code § 4.1–310 ..... 22, 25
W. Va. Code Ann. § 11-16-8 24
Wash. Rev. Code Ann. § 66.24.010 24
Wis. Stat. Ann. § 125.04 24

INTRODUCTION

The Twenty-first Amendment grants States "virtually complete control" over the intrastate distribution and sale of liquor. *Granholm v. Heald*, 544 U.S. 460, 488 (2005). Like nearly all States, Tennessee has exercised that authority to create a three-tier distribution system that separately regulates (1) producers of liquor, (2) wholesalers that act as middlemen, and (3) retailers that sell directly to consumers. As part of this regime, Tennessee imposes durational-residency requirements for retail liquor licenses. Tennessee law requires individuals to reside in Tennessee for two years before they are eligible for a license to sell liquor to consumers; the same requirements apply to the directors, officers, and capital stockholders of corporate applicants. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A). Tennessee is not alone: At least twenty-one States impose some form of durational-residency requirement for liquor retailers or wholesalers. And many States impose other residency-based requirements on those entities.

These laws make good sense. As Judge Sutton recognized below, States have a core Twenty-first Amendment interest in "[p]romoting responsible consumption and orderly liquor markets," through close regulation of liquor retailers and wholesalers. Pet.App. 50a (Sutton, J., dissenting). And retailers, in particular, "are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" *Id.* (quoting *Southern Wine & Spirits v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013)). Requiring individuals (or corporate principals) to

reside in the communities they serve for a sustained period before becoming eligible for retail or wholesale licenses ensures that each seller "will be knowledgeable about the community's needs and committed to its welfare." *Id.*

In the decision below, however, the Sixth Circuit held, over Judge Sutton's dissent, that Tennessee's durational-residency requirements violate the dormant Commerce Clause. The court acknowledged and deepened a circuit split about the constitutionality of such laws. The Fifth and now Sixth Circuits have held that durational-residency requirements violate the dormant Commerce Clause. The Eighth Circuit, in contrast, has held that they are a valid exercise of States' Twenty-first Amendment authority. As the Eighth Circuit put it, "state policies that define the structure of the [three-tier] liquor distribution system" are "'protected under the Twenty-first Amendment'" "against constitutional challenges based on the Commerce Clause," as long as they "giv[e] equal treatment to in-state and out-of-state liquor *products* and *producers* . . . ." *S. Wines & Spirits*, 731 F.3d at 809 (quoting *Granholm*, 544 U.S. at 489) (emphasis added). In so holding, the Eighth Circuit agreed with the approach of the Second and Fourth Circuits, which, following *Granholm*, upheld other kinds of residency-related restrictions on retailers and wholesalers.

This issue is important. It determines the constitutionality of durational-residency laws in at least twenty-one States. And in resolving the question presented, the Court will provide much-needed guidance to courts that have struggled to understand *Granholm*'s implications for other

restrictions that states impose on retailers and wholesalers. This case is also a clean vehicle—a declaratory-judgment action filed solely to determine the constitutionality of the law at issue. Finally, the decision below—which leaves next to no continuing role for Section 2 of the Twenty-first Amendment's grant of authority to the States—is wrong. The Court should grant certiorari and reverse the decision below.

OPINIONS BELOW

The District Court's opinion granting summary judgment to Respondent Tennessee Fine Wines (Pet.App. 57a–81a) is published at 259 F. Supp. 3d 785 (M.D. Tenn. 2017). The Sixth Circuit's decision affirming that judgment (Pet.App. 1a–56a) is published at 883 F.3d 608 (6th Cir. 2018).

JURISDICTION

The Sixth Circuit entered judgment on February 21, 2018. On April 26, 2018, Justice Kagan extended the time to file a certiorari petition to and including July 21, 2018. No. 17A1186. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Twenty-first Amendment of the United States Constitution provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

2. The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl.3.

3. Section 57-3-204(b) of the Tennessee Code Annotated, which addresses the issuance of licenses for the retail sale of alcoholic beverages, provides, in relevant part:

> (2) No retail license under this section may be issued or transferred to or held by, to any individual:
>
> > (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years;
>
> [. . .]
>
> (3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to, transferred to, or maintained by any corporation unless such corporation meets the following requirements:
>
> > (A) No retail license shall be issued to, transferred to, or maintained by any corporation if any officer, director, or stockholder owning any capital stock in the corporation, would be ineligible to

receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director, or stockholder in their individual capacity;

(B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;

[. . .]

(D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

(4) It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained

> in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D), (4).

STATEMENT

1. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). Consistent with that broad grant of authority, States are free "to ban the sale and consumption of alcohol altogether." *Id.* at 488–89. Alternatively, "States may . . . assume direct control of liquor distribution through state-run outlets." *Id.* at 489. Or they can set up a regulatory scheme governing private manufacturers, distributors, and retailers. Such three-tier systems are

"unquestionably legitimate." *Id.* (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

To be sure, state alcohol laws may be limited in some respects by the dormant Commerce Clause, which generally prevents States from "discriminat[ing] against interstate commerce" or "favor[ing] in-state economic interests over out-of-state interests." *See id.* at 487 (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)). For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court invalidated an excise tax that exempted some liquors produced in-State, where the sole, "undisputed . . . purpose of the exemption" was "mere economic protectionism" rather than "any clear concern of the Twenty-first Amendment." *Id.* at 271, 276. This Court later emphasized in *Granholm*, however, that "state policies" that define the structure of a three-tier distribution system "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. *Granholm* thus distinguished between discrimination against out-of-state products, which the dormant Commerce Clause prohibits, and a State's decisions about "how to structure the liquor distribution system" within its borders, over which "[t]he Twenty-first Amendment grants the States virtually complete control." *Id.* at 488. Indeed, all nine Justices agreed that States have virtually plenary authority over structuring a three-tier liquor distribution system, at least as long as they provide equal treatment to liquor produced in and out of state. *See id.*; *see also id.* at 518 (Thomas, J. dissenting).

2. Tennessee, like most States, has implemented a three-tier regulatory scheme for the distribution of alcohol. *See* Pet.App. 2a; *see also* *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008) (describing Tennessee's regulatory framework). Under that scheme, "[m]anufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases other wholesalers; [and] consumers are required to buy only from retailers." Pet. App 2a (quoting *Jelovsek*, 545 F.3d at 434); *see also* Tenn. Code Ann. § 57-3-404(b)–(d). The Tennessee Alcoholic Beverage Commission ("TABC" or the "Commission") oversees this system and issues licenses to individuals and entities that meet the statutory requirements. *See* Pet.App. 2a–3a; Tenn. Code Ann. § 57-3-201.

This case is about the statutory requirements for retail licenses. Tennessee law provides that, to obtain a retail license, an individual must have "been a bona fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made." Tenn. Code Ann. § 57-3-204(b)(2)(A). Corporations, for their part, are ineligible for a retail license "if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2)." *Id.* § 57-3-204(b)(3)(A).[1]

---

[1] Two other aspects of Tennessee's regulatory scheme were also at issue in the lower courts: "its application of the residency requirement to 100% of a retailer's stockholders, Tenn. Code Ann. § 57-3-204(b)(3)(A), (B), (D), and its imposition

The Tennessee legislature codified its explanation of the health and safety benefits of these durational-residency requirements:

> Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, . . . it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein . . . .

Tenn. Code Ann. § 57-3-204(b)(4).

3. Respondents Tennessee Fine Wines and Spirits, LLC ("Fine Wines") and Affluere Investments, Inc. ("Affluere") applied for Tennessee retail licenses in November 2016. *See* Pet.App. 3a. It is undisputed that neither entity satisfies the durational-residency requirements for these licenses. *See id.*; D.Ct. Dkt. 1-1, Compl. ¶¶ 12–13. Both entities have principal addresses outside Tennessee. *See* Pet.App. 3a; D.Ct. Dkt. 1-1, Compl. ¶¶ 3–4. And although Fine Wines is a Tennessee limited liability company, none of its members are Tennessee

---

(continued...)

of a ten-year residency requirement for renewal of a license, *id.* § 57-3-204(b)(2)(A)." Pet.App. 54a (Sutton, J., dissenting).

residents. *See* Pet.App. 3a; D.Ct. Dkt. 1-1, Compl. ¶ 4.

Petitioner Tennessee Wine and Spirits Retailers Association (the "Association") represents the interests of licensed Tennessee retailers. *See* Pet.App. 4a. The Association learned that the TABC was considering granting Fine Wines's and Affluere's retail-license applications despite their failure to satisfy the durational-residency requirements. *See id.* The Association then told the TABC that it would immediately sue over licenses issued in violation of state law. *See* D.Ct. Dkt. 1-1, Compl. ¶ 17. Fine Wines and Affluere, for their part, told the TABC that they would sue to challenge the constitutionality of the durational-residency requirements if the TABC denied their applications. *See id.* ¶ 18.

"[F]ace[d] [with] imminent litigation" over this dispositive issue, *id.* ¶ 25, the TABC's Executive Director, Clayton Byrd, filed a declaratory-judgment action in Tennessee state court. *See* Pet.App. 4a. Byrd named Fine Wines, Affluere, and the Association as Defendants. *See generally* D.Ct. Dkt. 1-1, Compl. The Complaint explained that the TABC's staff "f[ound] no other grounds for denying [Fine Wines' and Affluere's] license applications" besides the "statutory residency requirement." *Id.* ¶ 14. Byrd therefore sought a declaratory judgment about the constitutionality of those requirements, so that the TABC could "lawfully fulfill its duties . . . and correctly determine whether nonresident Defendants [Fine Wines and Affluere] may be issued a retail liquor license." *Id.* ¶ 27.

The Association removed the case on federal-question grounds. *See* Pet.App. 4a. The District

Court then realigned the parties to reflect their interests in the litigation, denominating Fine Wines and Affluere as Plaintiffs and the Association as Defendant. *See id.* at 4a n.1.[2]

Fine Wines moved for summary judgment, arguing that Tennessee's durational-residency requirements violate the dormant Commerce Clause. *See id.* at 57a–58a. Affluere sought a preliminary injunction on the same basis. *See* D.Ct. Dkt. 63.

4. The District Court granted Fine Wines' motion for summary judgment. Despite *Granholm*'s limitation of dormant Commerce Clause scrutiny to laws that "discriminate in favor of local *producers*," 544 U.S. at 489 (emphasis added), the court held that such scrutiny also extends to state laws governing local *retailers*. *See* Pet.App. 65a–72a. Next, the court found that Tennessee's durational-residency requirements in fact discriminate in favor of in-state retailers, even though they apply to in-state and out-of-state retailers alike. *Id.* at 73a–76a. Finally, the District Court found that those requirements do not "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 80a. The District Court therefore held that Tennessee's durational-residency requirements violate the dormant Commerce Clause, and enjoined their enforcement. *Id.* at 80a–801a.

---

[2] Although Byrd remained denominated as a Plaintiff, he defended the constitutionality of the state law in response to Fine Wines' summary judgment motion in the District Court, and on appeal in the Sixth Circuit. *See* Pet.App. 4a n.1.

6. A divided panel of the Sixth Circuit affirmed. The majority observed that this Court's precedents "ha[ve] created some uncertainty" about whether "the dormant Commerce Clause appl[ies] only when an alcoholic-beverages law regulates producers or products," or whether it also applies to regulations of retailers and wholesalers. *Id.* at 11a. And it acknowledged a circuit split on that fundamental question. *See id.* at 11a–12a. The Second, Fourth, and Eighth Circuits have interpreted *Granholm* to mean that the dormant Commerce Clause applies only to state laws that regulate alcohol *producers* or *products*. *See id.* at 12a–13a; *see also Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006); *S. Wine & Spirits*, 731 F.3d at 809–10. According to these circuits, the Twenty-first Amendment protects laws regulating alcohol *retailers* and *wholesalers* from dormant Commerce Clause scrutiny. The Fifth Circuit, on the other hand, has extended *Granholm* to retail regulation, and has held that durational-residency requirements fail dormant Commerce Clause scrutiny. *See* Pet.App. 13a–14a; *see also Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016) (*Cooper II*).

The panel majority followed the Fifth Circuit. *See* Pet.App. 15a. Like the Fifth Circuit, the panel wrote off the producer-specific language in *Granholm*, asserting that *Granholm* had "discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of 'producers' simply because *Granholm* involved statutes addressing that step in the three-tier system." *Id.* at 23a. And it relied on this Court's

earlier decision in *Bacchus* in holding that the dormant Commerce Clause extends to the regulation of retailers. *See id.* at 22a–23a.

The majority again followed the Fifth Circuit's reasoning in finding that Tennessee's interest in the durational-residency requirements did not implicate the core purposes of the Twenty-first Amendment. *See id.* at 24a–27a. These requirements, the court reasoned, "regulate the flow of individuals" rather than "the flow of alcoholic beverages within the state." *Id.* at 27a. Accordingly, the Twenty-first Amendment does not "immunize" them from "scrutiny under the dormant Commerce Clause." *Id.*

Finally, the majority concluded that Tennessee's law failed that scrutiny. The court acknowledged that the State had asserted two legitimate purposes for the durational-residency requirements—"(1) protecting 'the health, safety and welfare' of its citizens and (2) using a higher level of oversight and control over liquor retailers." *Id.* at 32a (quoting Tenn. Code Ann. § 57-3-204(b)(4)). But the court hypothesized that the State could achieve those purposes through nondiscriminatory means (for example, by "creating an electronic database to monitor liquor retailers"). *Id.* at 33a. Accordingly, the court held that the durational-residency requirements violated the dormant Commerce Clause, severed them from the Tennessee statute, and enjoined their enforcement. *See id.* at 33a–39a.

7. Judge Sutton dissented in relevant part. He began with the Constitution's text. Judge Sutton explained that the Commerce Clause's "dormant" aspect impliedly prohibits States from interfering with Congress's prerogative to "regulate Commerce

with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* at 40a (quoting U.S. Const. art. I, § 8, cl. 3). And "[w]hatever else this Tennessee requirement does," Judge Sutton observed, "it does not purport to displace or contradict congressional regulation of commerce among the States." *Id.* at 41a. As to the Twenty-first Amendment, Judge Sutton stressed that the text "prohibit[s] the 'delivery or use' of alcohol 'in violation of the laws' of each State," which "empowers States to regulate sales of alcohol within their borders." *Id.* (quoting U.S. Const. amend. XXI, § 2).

Judge Sutton also looked to history. In the beginning, he explained, federal and state government powers were "[l]argely exclusive." *Id.* at 42a. But that changed over time. As the federal commerce power expanded, the line between the two regulatory spheres blurred, until most business activities became subject to both state and federal regulation. *See id.* at 42a–43a. Accordingly, the scope of the dormant Commerce Clause—which was once crucial for keeping States from interfering in the federal sphere—became, in Judge Sutton's view, "more difficult to articulate and police." *Id.* at 46a.

Against that historical backdrop, Judge Sutton addressed this Court's Twenty-first Amendment precedents. Those precedents make clear that "the Commerce Clause still limits state efforts to regulate activity outside of a State's territorial domain." *Id.* at 48a. But "exceptions to the normal operation of the Commerce Clause remain alive and well in some areas—in particular the in-state nature of alcohol distribution." *Id.* at 49a. Indeed, *Granholm*

expressly said that, because in-state distribution "implicates the States' core interests after the repeal of Prohibition, such regulations are generally 'protected under [the Twenty-first Amendment] when they treat liquor produced out of state the same as its domestic equivalent.'" *Id.* (quoting *Granholm*, 544 U.S. at 488). Put differently, "[s]tate regulations of ***in-state distribution***, even if facially discriminatory, are constitutional unless a challenger can show that they serve *no purpose* besides 'economic protectionism.'" *Id.* (quoting *Bacchus*, 468 U.S. at 276) (emphases added).

"Measured by these standards and cases," Judge Sutton concluded, "Tennessee's two-year residency requirement should survive." *Id.* Some requirement that retailers reside in-state is an inherent part of the three-tier system that this Court has repeatedly and unequivocally endorsed. *See id.* at 50a. Moreover, "retailers are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" *Id.* (quoting *S. Wine & Spirits*, 731 F.3d at 811). And durational-residency requirements for retailers ensure that individuals responsible for the sale of alcohol to Tennessee citizens will develop an understanding of and commitment to the needs of the local community before becoming licensed to sell alcohol directly to the members of that community. *See id.* The same logic applies "to a residency requirement for officers and directors of the retailer." *Id.* at 51a. Accordingly, Judge Sutton would have followed the Eighth Circuit, which "approved [durational-residency] requirements nearly identical to Tennessee's." *Id.* In contrast, Judge Sutton

explained, the panel majority and the Fifth Circuit in *Cooper II* "misread *Granholm*" and contravened the Twenty-first Amendment by allowing "a court [to] unnecessarily substitute its own judgment for that of a state legislature about the best policies for regulating liquor." *Id.* at 53a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are squarely divided about whether a state may exercise its Twenty-first Amendment authority by requiring individuals or entities to reside in-state for a certain period before they may obtain a retail or wholesale liquor license. The Fifth and Sixth Circuits have held that such laws violate the dormant Commerce Clause; the Eighth Circuit has held that they are valid under the Twenty-first Amendment. This divide reflects a fundamental disagreement—one that the Second and Fourth Circuits have also addressed—about whether and how, in light of *Granholm*, the dormant Commerce Clause limits state authority to regulate alcohol retailers and wholesalers (as opposed to producers). This issue is important, particularly given the prevalence of durational-residency requirements and other residency-related regulations of wholesalers and retailers. And the decision below is wrong because it misunderstands the text of the relevant constitutional provisions and misconstrues this Court's precedents. This Court should grant the petition for a writ of certiorari and reverse the judgment of the Sixth Circuit.

I. THE COURTS OF APPEALS ARE DIVIDED.

A. The Fifth and Sixth Circuits Have Struck Down Durational-Residency Requirements.

1. In *Cooper II*, the Fifth Circuit held that Texas's one-year residency requirement for liquor retailers violated the dormant Commerce Clause. *See* 820 F.3d 730 (upholding injunction against enforcement of Tex. Alco. Bev. Code Ann. § 109.53).

The case involved a decades-old injunction issued in a suit brought by two individuals who did not reside in Texas but wanted to buy a Texas nightclub licensed to sell liquor. *See Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) (*Cooper I*). In *Cooper I*, which predated this Court's decision in *Granholm*, the Fifth Circuit relied mainly on *Bacchus* in concluding that Texas's durational-residency requirement violated the dormant Commerce Clause. *See id.* at 555. The Fifth Circuit therefore enjoined Texas from enforcing its law. *See id.* at 555–56.

Later, in *Granholm*, this Court explained that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. So a trade association, the Texas Package Stores Association, intervened and moved for relief from the outdated injunction, because Texas's law—which regulated retailers and wholesalers, and had nothing to do with disparate treatment of in-state and out-of-state liquor producers—passed *Granholm*'s test. *See Cooper II*, 820 F.3d at 734–36.

The Fifth Circuit adhered to its holding that Texas's durational-residency requirement was

unconstitutional. The court dismissed as dicta *Granholm*'s statements that three-tier systems are "unquestionably legitimate" and that policies that do not discriminate against liquor produced out of state are "protected under the Twenty-first Amendment." *Id.* at 742–43 (quoting *Granholm*, 544 U.S. at 489). Indeed, it held precisely the opposite—that "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." *Id.* at 743. "Distinctions between in-state and out-of-state retailers and wholesalers are permissible," the Fifth Circuit concluded, "only if they are an inherent aspect of the three-tier system." *Id.* And in the Fifth Circuit's view, a "durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers" is not an inherent requirement of such a system. *Id.*

2. As described above, *see supra* 12–13, the Sixth Circuit majority below followed *Cooper II*. The court below summarized, at length, the varying attempts of the "Second, Fourth, Fifth, and Eighth Circuits . . . to reconcile [this Court's] cases" involving the Twenty-first Amendment. Pet.App. 11a. Rejecting the approach of most of these circuits, the Sixth Circuit "f[ou]nd the Fifth Circuit's reconciliation of *Bacchus* and *Granholm* persuasive." *Id.* at 15a. In particular, the court emphasized that "the Supreme Court explicitly declined to overrule *Bacchus* in *Granholm*." *Id.* And it afforded little weight to *Granholm*'s statements about liquor production because "*Granholm* involved statutes addressing that step in the three-tier system." *Id.* at 23a. Moreover, because "Tennessee's durational-

residency requirements are nearly identical to" Texas's, the court found that the analysis in *Cooper II* was on all fours with this case. *Id.* at 26a. It therefore held that the dormant Commerce Clause bars Tennessee from requiring that a liquor retailer reside in-state for a set time to be eligible for a license.

B. The Eighth Circuit Has Upheld Durational-Residency Requirements.

Judge Sutton would have followed the Eighth Circuit's "thoughtful opinion" in *Southern Wine & Spirits v. Div. of Alcohol & Tobacco*, 731 F.3d 799 (8th Cir. 2013), which upheld "requirements nearly identical to Tennessee's." Pet. App. at 51a. That case involved a Missouri law providing that a license to engage in the wholesale distribution of "intoxicating liquor containing alcohol in excess of five percent by weight" could be granted only to a "resident corporation"—*i.e.*, one whose corporate officers and directors had been "bona fide residents" of Missouri for at least three years. Mo. Rev. Stat. §§ 311.060.2(3), 311.060.3. The plaintiff, an entity ineligible for a license because of that requirement, alleged that Missouri's law violated the dormant Commerce Clause.

Writing for a unanimous panel, Judge Colloton acknowledged that "the Supreme Court has sent conflicting signals about the relationship between these two constitutional provisions." 731 F.3d at 804. *Granholm* itself, however, had reconciled this Court's earlier precedents. On the one hand, "the Twenty-first Amendment granted the States 'virtually complete control over whether to permit importation or sale of liquor and how to structure the

liquor distribution system.'" *Id.* at 805 (quoting *Cal. Retail*, 445 U.S. at at 110). On the other hand, state regulations of production, rather than distribution, do not implicate core Twenty-first Amendment authority and thus must comply with the dormant Commerce Clause. *See id.* (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984)). Consistent with these principles, *Granholm* concluded that "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment," *Granholm*, 544 U.S. at 466, so long as "they treat liquor produced out of state the same as its domestic equivalent," *id.* at 489.

Applying these standards, the Eighth Circuit upheld Missouri's durational-residency requirement. The court first rejected the argument that the law was unconstitutional in light of *Bacchus*. Even "[a]ssuming that *Bacchus*'s analysis of economic protectionism should apply to a regulation of the wholesale tier," the court reasoned, a durational-residency requirement has a non-protectionist rationale: "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals." *S. Wine & Spirits*, 731 F.3d at 807–09 (citing Mo. Rev. Stat. § 311.015). In any event, the court held, consistent with *Granholm*, that "state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and producers are 'protected under the Twenty-first Amendment.'" *Id.* (quoting *Granholm*, 544 U.S. at 489). Because durational-residency requirements fit that bill, the court upheld Missouri's law as a

permissible exercise of Twenty-first Amendment authority—regardless of whether it would otherwise offend the dormant Commerce Clause. *See id.* at 810. The court added, finally, that durational-residency requirements would pass muster even if some Commerce Clause scrutiny applied: "Missouri residents, the legislature sensibly could suppose, are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs." *Id.* at 811.

C. Applying the Same Approach as the Eighth Circuit, the Second and Fourth Circuits Have Upheld Other Residency-Related Restrictions on Retailers and Wholesalers.

Two other courts of appeals—the Second and Fourth Circuits—have rejected constitutional challenges to other kinds of residency-related restrictions on wholesalers and retailers. Both circuits adopted the same approach as the Eighth Circuit. They upheld these state laws because, under *Granholm*, "the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state *producers*." *Brooks*, 462 F.3d at 354 (emphasis added).

1. In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, the Second Circuit upheld a New York law prohibiting "out-of-state wine retailers from selling and delivering wine directly to New York consumers." *Id.* at 187; *see* N.Y. Alco. Bev. Cont. Law §§ 100(1), 102(1)(a)–(b). That ruling followed directly from *Granholm*, which "set forth the test for determining the constitutionality of state liquor

regulations." *Arnold's Wines*, 571 F.3d at 189. "While the Twenty-first Amendment grants the states broad powers to regulate the transportation, sale, and use of alcohol within their borders, it simply does not immunize attempts to discriminate in favor of local products and producers." *Id.* at 191. Those principles, the court held, foreclosed the plaintiffs' claim. "Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state *products* or *producers*," the court found no need to "analyze the regulation further under Commerce Clause principles." *Id.*

Judge Calabresi concurred, writing separately to say that this Court has, "[r]egrettably," "le[ft] lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from [its] Twenty-First Amendment decisions." *Id.* at 192. Judge Calabresi also noted that the Twenty-first Amendment, in a departure from its original meaning, "has been defined and redefined to accommodate changing social needs and norms," making it a case study of the "important theoretical questions about the role of courts" in constitutional interpretation. *Id.*

2. The Fourth Circuit similarly upheld a Virginia law that, among other things, established an "exception to the three-tier import restriction for consumers who personally carry into Virginia no more than one gallon (or four liters) of alcoholic beverages for personal consumption." *Brooks*, 462 F.3d at 345; *see* Va. Code § 4.1–310(E). The plaintiffs argued that this exception violated the dormant

Commerce Clause by favoring in-state retailers, who could sell unlimited amounts of liquor to Virginia residents, over their out-of-state counterparts, who could sell only a single gallon. 462 F.3d at 352.

The Fourth Circuit recognized that *Granholm* foreclosed that argument. Under *Granholm*, "the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state producers." *Id.* at 354. "[A]n argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." *Id.* at 352. And *Granholm*, the court held, precludes any such challenge. *See id.*

3. These Second and Fourth Circuit decisions involved residency-related regulations other than durational requirements. But both turned on the same core question as the decision below, and the Fifth and Eighth Circuit durational-residency cases: In the wake of *Granholm*, "[d]oes scrutiny under the dormant Commerce Clause apply only when an alcoholic-beverages law regulates producers or products?" Pet.App. 11a. The circuits are intractably divided about how to analyze the constitutionality of state laws regulating retailers and wholesalers of alcohol.

II. THE QUESTION PRESENTED MERITS THE COURT'S ATTENTION.

1. At least twenty-one states impose durational-residency requirements on alcohol retailers or

wholesalers.[3] These requirements vary in some ways. *Compare, e.g.*, S.C. Code Ann. § 61-6-110 (30-day residency requirement), *with* Okla. Stat. tit. 37, § 527 (10-year residency requirement); *compare, e.g.*, Ky. Rev. Stat. Ann. § 243.100(1)(f) (requirement applicable to individuals only), *with* Ind. Code § 7.1-3-21-5 (requirement applicable to both individuals and corporations); *see also, e.g.*, Ga. Code Ann. § 3-4-23(a) (requirement specific to the county or municipality). But this variation merely reflects the States' use of their Twenty-first Amendment authority and expertise to craft liquor laws that suit the needs of their residents. Under the Sixth Circuit's reasoning, all of these laws are likely unconstitutional.

There are many more state laws that—like those at issue in the Second and Fourth Circuit decisions—impose other forms of residency-related restrictions on retailers or wholesalers. *See, e.g.*, 235 Ill. Comp. Stat. 5/6-29.1(b) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly

---

[3] *See* Ark. Code Ann. § 3-4-606(a)(1)–(3); Ga. Code Ann. § 3-4-23(a)–(b); Ind. Code Ann. § 7.1-3-21-5(5)(a)–(b); Kan. Stat. Ann. § 41-311(b); Ky. Rev. Stat. Ann. § 243.100(1)(f); La. Stat. Ann. § 26:80(A)(2); Me. Rev. Stat. tit. 28-A, § 1401(5)(A)–(B); Md. Code, Alcoholic Beverages, § 3-102; Mich. Comp. Laws Ann. §436.1601; Miss. Code. Ann. § 67-3-21; Mo. Rev. Stat. § 311.060.2(3); N.H. Rev. Stat. Ann. § 178:1; Okla. Stat. Ann. tit. 37, § 527; 47 Pa. Stat. Ann. §§ 4-403, 4-410, 4-431, 4-432; S.C. Code Ann. § 61-6-110(2); Tenn. Code Ann. § 57-3-203; Tex. Alco. Bev. Code Ann. § 6.03(a); Va. Code Ann. § 4.1-222; Wash. Rev. Code Ann. § 66.24.010(2)(a); W. Va. Code Ann. § 11-16-8(a)(1); Wis. Stat. Ann. § 125.04(5); *see also* Idaho Code Ann. § 23-304 (durational-residency requirement for "special distributors").

to Illinois consumers); N.Y. Alco. Bev. Cont. Law §§ 100(1), 102(1)(a)–(b) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly to New York consumers); Va. Code § 4.1–310(E) (creating an exception to personal-import ban that favors in-state retailers); Cal. Bus. & Prof. Code § 23366.2 (prohibiting out-of-state wholesalers, but not in-state wholesalers, from selling liquor directly to in-state retailers). The constitutionality of these laws, too, turns on the interplay between the Twenty-first Amendment and the dormant Commerce Clause when it comes to state regulation of alcohol retailers and wholesalers.

2. The constitutionality of dozens of state laws is more than important enough to merit this Court's intervention. *See, e.g.*, *Sveen v. Melin*, 138 S. Ct. 1815 (2018) (considering the constitutionality of retroactive application of state revocation-on-divorce statutes); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (considering the constitutionality of state statutes limiting sex offenders' internet access); *cf. Cty. of Maricopa v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from denial of certiorari) ("States deserve our careful consideration when lower courts invalidate their constitutional provisions.").

This Court has also often granted certiorari to resolve conflicts among the courts of appeals about the meaning of the Twenty-first Amendment. *See, e.g.*, *Granholm*, 544 U.S. 460; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *North Dakota*, 495 U.S. 423; *Bacchus Imports*, 468 U.S. 263. But it has been thirteen years since the Court has addressed this constitutional provision. And in that

time, perceived contradictions within this Court's Twenty-first Amendment jurisprudence have "le[ft] lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from [this Court's] Twenty-First Amendment decisions." *Arnold's Wines*, 571 F.3d at 192 (Calabresi, J., concurring). Indeed, courts have consistently acknowledged the pervasive confusion about the interaction of the Twenty-first Amendment and the dormant Commerce Clause post-*Granholm*. *See id.* at 200 (observing that lower courts have been left "in a difficult situation"); *S. Wine & Spirits*, 731 F.3d at 804 ("[T]he Supreme Court has sent conflicting signals about the relationship between these two constitutional provisions."); Pet.App. 11a ("The interaction between *Bacchus* and *Granholm* has created some uncertainty."). Only this Court can alleviate that confusion—and resolve the resulting division of authority.

4. This petition presents a clean vehicle for this Court to do so. This case is a declaratory-judgment action raising a single question: whether Tennessee's durational-residency requirements are a constitutional exercise of the State's authority under the Twenty-first Amendment, or are instead prohibited by the dormant Commerce Clause. Pet.App. 4a. The Complaint alleges that this question determines the entitlement of the Respondent applicants to liquor licenses. D.Ct. Dkt. 1-1, Compl. ¶¶ 14, 27. And the parties preserved, and the lower courts decided, that question at each stage of the proceedings below. This Court should take this opportunity to decide this important issue,

which affects the constitutionality of dozens of state laws and has prompted numerous court of appeals judges to lament the confusion flowing from this Court's existing precedents.

III. THE SIXTH CIRCUIT'S DECISION IS WRONG.

The decision below is wrong as a matter of constitutional text, history, and this Court's precedents. Indeed, the Sixth Circuit majority effectively neuters Section 2 of the Twenty-first Amendment and *Granholm*'s promise that States have broad leeway to structure three-tier distribution systems.

1. The Twenty-first Amendment gives States broad authority to regulate "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors." U.S. Const. amend. XXI, § 2. "Unlike any other provision in the U.S. Constitution," the Amendment thereby "sets up what is largely a regulatory regime of one." Pet.App. at 41a (Sutton, J., dissenting). And its text does not limit State authority in this arena.

The Commerce Clause, in turn, grants Congress exclusive authority "[t]o regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl.3. The dormant aspect of that Clause reinforces that exclusivity, impliedly prohibiting states from exercising authority in that exclusively federal arena. *See* Pet.App. at 42a–44a.

2. The history of these provisions shows how the drafters of the Twenty-first Amendment expected them to operate in tandem. At the time that Amendment was adopted in 1933, the state and

federal "spheres of authority" were "[l]argely exclusive." *Id.* at 42a. So if the States had authority in a particular area, the federal government generally did not—and vice versa. *See id.* Accordingly, "[f]rom the vista of 1933, a lawyer (and judge) would have presumed that the regulation of sales of alcohol within the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power given the existing paradigm of largely separate and exclusive spheres of regulatory power." *Id.* at 44a.

It is unsurprising, therefore, that this Court at first understood the Twenty-first Amendment to give States essentially plenary authority to regulate intrastate alcohol distribution, "including in ways that the Commerce Clause would not otherwise allow." *Id.* at 46a:

> The words used [in § 2] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

But things changed. The scope of federal power to regulate commerce expanded, injecting federal authority into what were once exclusively state arenas. And the understanding of the dormant Commerce Clause changed, too: "[I]n a post-1930s world, in which the National Government and States largely have overlapping power over most sectors of commerce, the implementation of an implied restriction on state authority is much more difficult to articulate and police." *See* Pet.App. 45a–46a. Still, however, "[a]n exclusive delegation of power to one sovereign"—whether that be the grant of alcohol-regulatory authority to the states or the grant of commerce power to the federal government—"implies a ban on assertions of power by another sovereign over the same matter." *Id.*

3. This Court's more recent Twenty-first Amendment cases confirm that States retain special authority in regulating alcohol. *See Capital Cities*, 467 U.S. at 712 (explaining that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause"). States maintain "virtually complete control" over "how to structure the[ir] liquor distribution system[s]." *Granholm*, 544 U.S. at 488.

Granholm, this Court's most recent case about the Twenty-first Amendment, involved regulations that permitted in-state wineries, but not out-of-state ones, to ship directly to in-state consumers. 544 U.S. at 468–70. This "differential treatment between in-state and out-of-state wineries," the Court explained, "constitute[d] explicit discrimination" against the flow of goods across state lines in a way that—were it

not for the Twenty-first Amendment—would violate the dormant Commerce Clause. *Id.* at 467.

The Twenty-first Amendment, the Court also determined, did not "sav[e]" these laws. *Id.* at 489. In particular, that provision "does not displace the rule that States may not give a discriminatory preference to their own *producers*." *Id.* at 486 (emphasis added). And it does "not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484–85. Accordingly, because the laws at issue were "straightforward attempts to discriminate in favor of local producers" (and thus against out-of-state goods) the Court held that they violated the dormant Commerce Clause. *Id.* at 489.

The *Granholm* Court, however, was careful to cabin its ruling—and preserve the force of the Twenty-first Amendment. The Court emphasized that it did not "call into question the constitutionality of the three-tier system"—a system both the majority and dissent recognized as "unquestionably legitimate." *Id.* at 488–89; *see also id.* at 518 (Thomas, J., dissenting). And the Court made clear that the Twenty-first Amendment still provided absolute protection for regulation of in-state sales, rather than products. "State policies," the Court stated, "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489.

4. That principle resolves this case. Tennessee's durational-residency requirements, like other such laws, "treat liquor produced out of state the same as its domestic equivalent." *Id.* As a

result, *Granholm* compels the conclusion that they are "protected under the Twenty-first Amendment." *Id.* Were it otherwise—if, as the Sixth Circuit majority suggested, the Twenty-first Amendment conferred no special protections for laws regulating wholesalers and retailers of alcohol—Section 2 of the Twenty-first Amendment would have little or no role to play. A dormant Commerce Clause challenge to a regulation concerning alcohol, in other words, would be no different than such a challenge to any other kind of regulation. Neither constitutional history nor this Court's precedents support that result. *See Capital Cities*, 467 U.S. at 712 (observing that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause").

In any event, even if laws exclusively applicable to retailers or wholesalers were subject to some limited form of dormant Commerce Clause scrutiny, durational-residency requirements should survive. These requirements serve important State interests in protecting the "health, safety and welfare" of citizens. Tenn. Code Ann. § 57-3-204(b)(4). The consequences of excessive alcohol consumption—such as drunk driving, loss of employment, and homelessness—do not fall on one individual alone; they affect the community as a whole. Durational-residency requirements ensure that alcohol retailers know their community and are invested in its welfare. In other words, "[t]he only way to know a community is to live there." Pet.App. 50a. Indeed, that is presumably "why Congress requires federal court of appeals judges to live within their circuits, and district court judges to live within their districts." *Id.* at 50a–51a (citing 28 U.S.C. §§ 44(c),

134(b)). Durational-residency requirements like Tennessee's serve the same interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

July 20, 2018

Respectfully submitted,

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Avenue
North, Suite 340-M
Nashville, TN 37201

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

APPENDIX

APPENDIX A

Clayton BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More; Affluere Investments, Inc., dba Kimbrough Fine Wines &Spirits

Plaintiffs-Appellees,

v.

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Defendant-Appellant.

No. 17-5552

United States Court of Appeals,
Sixth Circuit.

Argued: November 30, 2017

Decided and Filed: February 21, 2018

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:16-cv-02738—Kevin H. Sharp, District Judge.

Before: DAUGHTREY, MOORE, and SUTTON, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Defendant-Appellant Tennessee Wine and Spirits Retailers Association ("Association") appeals the district court's order granting summary judgment regarding § 57-3-204(b) of Tennessee Code Annotated. Under § 57-3-204(b), to receive a retailer-alcoholic-beverages license, a person, corporation, or firm needs to be a Tennessee resident for at least two years, and to renew a license, there is a ten-year requirement. After examination, the district court determined that these durational-residency requirements violate the dormant Commerce Clause.

For the reasons discussed below, we **AFFIRM** the district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) in violation of the dormant Commerce Clause and **SEVER** those provisions from the Tennessee statute.

I. BACKGROUND

In Tennessee, the distribution of alcoholic beverages occurs through a "three-tier system." *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008). "The Tennessee Alcoholic Beverage Commission ('TABC') issues separate classes of licenses to manufacturers and distillers, wholesalers, and liquor retailers." *Id.* at 433–34 (citing Tenn. Code Ann. § 57-3-201). "Manufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases other wholesalers; consumers are required to buy only from retailers." *Id.* at 434 (citing Tenn. Code Ann. § 404(b)–(d)).

A license from the TABC is required to sell "alcoholic spirituous beverages, including beer and

malt beverages." Tenn. Code Ann. § 57-3-204(a). However, to obtain a license, an individual must have "been a bona fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made to the commission." *Id.* § 57-3-204(b)(2)(A). Additionally, the statute imposes a ten-year residency requirement to renew the license. *Id.*

A corporation faces similar barriers, and it cannot receive a license "if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2)." *Id.* § 57-3-204(b)(3)(A). Moreover, "[a]ll of [a corporation's] capital stock must be owned by individuals who are residents of [Tennessee] and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or," for renewal, "has at any time been a resident of [Tennessee] for at least ten (10) consecutive years." *Id.* § 57-3-204(b)(3)(B).

Two entities—Plaintiff-Appellee Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More, and Plaintiff-Appellee Affluere Investments, Inc., d/b/a/ Kimbrough Fine Wine & Spirits—did not satisfy these barriers prior to applying for retail licenses. As of November 2016, Fine Wines's principal address and Affluere's principal address were outside of Tennessee. R. 23-2 (Resp. Ex. 2) (Page ID #133); R. 23-3 (Resp. Ex. 3) (Page ID #134). And Fine Wines's members are not Tennessee residents. R. 55-1 (Mot. Summ. J. Ex. 1 ¶ 5) (Page ID #298). Therefore, the TABC deferred voting on these applications. *Id.* ¶¶ 13, 15 (Page ID

#299); R. 1-1 (Compl. ¶ 15) (Page ID #7); R. 1-2 (Affluere Answer ¶ 15) (Page ID #38).

When the Association, which represents Tennessee's business owners, discovered that Fine Wines and Affluere had pending applications, it informed the TABC that litigation was likely. R. 1-1 (Compl. ¶¶ 2, 16, 17) (Page ID #5, 8); R. 80 (Ass'n Am. Answer ¶¶ 2, 16, 17) (Page ID #495, 498). Because of these conflicts, Tennessee's Attorney General filed this action in the Chancery Court for Davidson County, on behalf of Plaintiff-Appellee Clayton Byrd, the Executive Director of the TABC, to obtain a declaratory judgment construing the constitutionality of the durational-residency requirements. R. 1-1 (Compl. at 1) (Page ID #4). The Defendant Association removed the case to the United States District Court for the Middle District of Tennessee.[1]

The district court determined that the durational-residency requirements are unconstitutional. *See Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 259

---

[1] After the Association removed the action to federal court, R. 1 (Notice Removal at 1) (Page ID #1), the district court realigned Fine Wines and Affluere as plaintiffs because, in his complaint, Byrd contended that the durational-residency requirements may be unconstitutional, which the Attorney General highlighted in two opinions. R. 52 (Op. Mem. at 11) (Page ID #282); R. 53 (Order ¶ 2) (Page ID #289). However, in his response to Fine Wines's motion for summary judgment, Byrd asserted that the durational-residency requirements are not unconstitutional. *See* R. 73 (Resp. at 1–13) (Page ID #450–62). Byrd continues to assert during this appeal that the durational-residency requirements are not unconstitutional. *See* Appellee Byrd Br. at 3.

F.Supp.3d 785, 797–98 (M.D. Tenn. 2017). Based on the statutory language, the district court found that the durational-residency requirements are facially discriminatory. *See id.* at 790. And although the Twenty-first Amendment does give Tennessee power to regulate alcoholic beverages, the district court "agree[d] with the Fifth Circuit that 'state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor.' " *Id.* at 790, 793 (quoting *Cooper v. Tex. Alcoholic Beverage Comm'n (Cooper II)*, 820 F.3d 730, 743 (5th Cir.), *cert. denied sub nom. Tex. Package Stores Ass'n, Inc. v. Fine Wine & Spirits of N. Tex., LLC*, — U.S. ——, 137 S.Ct. 494, 196 L.Ed.2d 404 (2016)). Additionally, nondiscriminatory alternatives could achieve the durational-residency requirements' purposes—citizen health and alcohol regulation. *Id.* at 796–97. The district court therefore determined that Tennessee's durational-residency requirements violate the dormant Commerce Clause and granted Fine Wines's motion for summary judgment. *Id.* at 797–98.

II. DISCUSSION

We review de novo a district court's decision to grant summary judgment, *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005), and we also review de novo a district court's determination of the constitutionality of a state statute, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006). Granting summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

P. 56(a). For this determination, we review all facts in a light that is most favorable to, and draw all reasonable inferences in favor of, the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

A. The Twenty-first Amendment Does Not Immunize Tennessee's Durational-Residency Requirements

Under the Supreme Court's governing standard, Tennessee's interests in the durational-residency requirements are not closely related to its power under the Twenty-first Amendment. Therefore, the Twenty-first Amendment does not immunize Tennessee's durational-residency requirements from scrutiny under the dormant Commerce Clause.

1. Tennessee's Durational-Residency Requirements in Light of *Granholm* and *Bacchus*

Section 2 of the U.S. Constitution's Twenty-first Amendment states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend XXI, § 2. Pursuant to the Twenty-first Amendment, a state has the power to regulate the distribution of alcoholic beverages into the state or within its borders.

"Initially, the Supreme Court afforded the states nearly limitless power to regulate alcohol under the [Twenty-first Amendment]." *Heald v. Engler*, 342 F.3d 517, 522 (6th Cir. 2003), *aff'd sub nom. Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161

L.Ed.2d 796 (2005). However, "as early as the 1960s, the Supreme Court signaled a break with this line of reasoning."[2] *Id.* And in 1984, the Supreme Court

---

[2] The dissent summarizes the history of § 2 to support the conclusion that states have the authority to impose durational-residency requirements on owners because these requirements are regarding intrastate distribution of alcohol beverages, not the interstate flow of product. See Dissent Op. at 629–33. However, this history is less persuasive than the dissent makes it sound.

The Supreme Court already conducted an extensive historical analysis in *Granholm*, 544 U.S. at 476–87, 125 S.Ct. 1885, to reach its own interpretation of modern precedent: "[w]hen a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, [the Supreme Court has] generally struck down the statute without further inquiry," id. at 487, 125 S.Ct. 1885 (emphasis added) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)). Thus, contrary to the dissent's conclusion, the proper backdrop to understand the interplay between the Twenty-first Amendment and the Commerce Clause is this statement in *Granholm*—a state cannot use the Twenty-first Amendment to impede directly or indirectly on interstate commerce; even an effect on interstate commerce is invalid.

Additionally, the dissent fails to acknowledge that the Supreme Court has explicitly transitioned from its original interpretation of the Twenty-first Amendment. For instance, the Supreme Court's opinion in *Granholm*, 544 U.S. at 484–86, 125 S.Ct. 1885, abrogated *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), which the dissent does not acknowledge. In particular, the Supreme Court explicitly rejected the paragraph in *Young's Market* that the dissent quotes on page twenty-eight:

> The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation,

importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.

Some of the cases decided soon after ratification of the Twenty-first Amendment did not take account of this history and were inconsistent with this view. In *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62, 57 S.Ct. 77, 81 L.Ed. 38 (1936), for example, the Court rejected the argument that the Amendment did not authorize discrimination:

> "The plaintiffs ask us to limit this broad command [of § 2]. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

The Court reaffirmed the States' broad powers under § 2 in a series of cases, see *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246 (1939), and unsurprisingly many States used the authority bestowed on them by the Court to expand trade barriers. T. Green, Liquor Trade Barriers: Obstructions to Interstate Commerce in Wine, Beer, and Distilled Spirits 4, and App. I (1940) (stating in the wake of *Young's Market* that "[r]ivalries and reprisals have thus flared up").

> It is unclear whether the broad language in *Young's Market* was necessary to the result because the Court also stated that "the case [did] not present a question of discrimination prohibited by the commerce clause." 299 U.S., at 62, 57 S.Ct. 77. The Court also declined, contrary to the approach we take today, to consider the history

reiterated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), that the Commerce Clause limits a state's power under the Twenty-first Amendment. *Heald*, 342 F.3d at 523.

In *Bacchus*, the Supreme Court noted that "[i]t is by now clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." 468 U.S. at 275, 104 S.Ct. 3049. "To draw a conclusion that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." *Id.* (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964)). The Supreme Court stated that "both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution and each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.* (quoting *Hostetter*, 377 U.S. at 332, 84 S.Ct. 1293). Additionally, the Supreme

---

> underlying the Twenty-first Amendment. *Id.*, at 63–64, 57 S.Ct. 77. This reluctance did not, however, reflect a consensus that such evidence was irrelevant or that prior history was unsupportive of the principle that the Amendment did not authorize discrimination against out-of-state liquors. . . .
>
> *Granholm*, 544 U.S. at 484–86, 125 S.Ct. 1885 (alterations in original). The Supreme Court also implied that *Young's Market* is inconsistent with the Wilson Act and the Webb-Kenyon Act. *See id.* at 484–85, 125 S.Ct. 1885. Therefore, cases such as *Young's Market* are not reliable for this analysis.

Court emphasized that "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276, 104 S.Ct. 3049. Because of these issues, the Supreme Court stated that a court needs to consider "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* at 275–76, 104 S.Ct. 3049 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984)).

The Supreme Court examined Hawaii's tax exemption at the wholesale tier for okolehao, which is a root from an indigenous shrub, and pineapple wine in *Bacchus*. *Id.* at 265, 104 S.Ct. 3049. The question before the Supreme Court was "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275, 104 S.Ct. 3049. The Supreme Court noted that Hawaii did "not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry.' " *Id.* at 276, 104 S.Ct. 3049. Thus, the Supreme Court determined that the Twenty-first Amendment did not immunize Hawaii's law "because the tax violates a central tenet of the Commerce Clause but is not

supported by any clear concern of the Twenty-first Amendment." *Id.*

In *Granholm*, the Supreme Court examined whether "a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate[s] the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment." 544 U.S. at 471, 125 S.Ct. 1885. When considering this question, the Supreme Court stated that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489, 125 S.Ct. 1885. And because the "instant cases" before the Supreme Court "involve[d] straightforward attempts to discriminate in favor of local producers . . . [t]he discrimination [was] contrary to the Commerce Clause and [was] not saved by the Twenty-first Amendment." *Id.* The Supreme Court also reasserted its previous recognition that "the three-tier system itself is 'unquestionably legitimate.' " *Id.* at 489, 125 S.Ct. 1885 (quoting *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990)).

The interaction between *Bacchus* and *Granholm* has created some uncertainty. Does scrutiny under the dormant Commerce Clause apply only when an alcoholic-beverages law regulates producers or products? And does the Twenty-first Amendment automatically immunize a state law regarding retailers and wholesalers of alcoholic beverages? The Second, Fourth, Fifth, and Eighth Circuits have attempted to reconcile the cases. *Cooper II*, 820 F.3d at 743; *S. Wine & Spirits of Am., Inc. v. Div. of*

Alcohol & Tobacco Control, 731 F.3d 799, 809, 810 (8th Cir. 2013); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2nd Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006).

For example, in *Arnold's Wines* the Second Circuit examined a state law allowing in-state licensed retailers to deliver alcoholic beverages to customers' homes but preventing out-of-state retailers from doing the same. 571 F.3d at 188. The court stated that "[t]he *Granholm* Court set forth the test for determining the constitutionality of state liquor regulations," which was that "[i]f the state measure discriminates in favor of in-state producers or products, the regulatory regime is not automatically saved by the Twenty-first Amendment simply by virtue of the special nature of the product regulated." *Id.* at 189. Additionally, the court reasoned that "[i]t is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause." *Id.* at 190. Thus, "Appellants' challenge to the ABC Law's provisions requiring all wholesalers and retailers be present in and licensed by the state . . . [was] a frontal attack on the constitutionality of the three-tier system itself." *Id.* "Appellants' argument [was] therefore directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system." *Id.* at 190–91.

In *Southern Wine*, the Eighth Circuit examined Missouri's law requiring a corporation—including its directors, officers, and super-majority of shareholders—to be residents of Missouri for three

years prior to obtaining a wholesaler-alcoholic-beverages license. 731 F.3d at 802–03. When reviewing "the current state of the relationship between the dormant Commerce Clause and the Twenty-first Amendment," the Eighth Circuit noted that, "in its most recent pronouncement on the subject, the Supreme Court simultaneously cited *Bacchus* and said that 'state policies are protected under the Twenty-first Amendment when they treat liquor produced out of the state the same as its domestic equivalent.' " *Id.* at 809 (citing *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). "Given *Granholm*'s recency and specificity," the court decided that *Granholm* provided the "best guidance." *Id.* The Eighth Circuit concluded that "[i]f it is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause, then . . . States have flexibility to define the requisite degree of 'in-state' presence to include the in-state residence of wholesalers' directors and officers, and a supermajority of their shareholders." *Id.* at 810 (citation omitted). "Insofar as *Granholm* imported [*Bacchus*'s] balancing approach to regulations of the three-tier system, . . . it drew a bright line between the producer tier and the rest of the system." *Id.* Therefore, in the view of the Eighth Circuit, the residency requirement for alcoholic-beverages wholesalers did not violate the dormant Commerce Clause. *See id.* at 809.

Conversely, the Fifth Circuit determined that *Bacchus* is still good law. In *Cooper II*, the defendant, a Texas trade association, moved for relief from an injunction under Federal Rule of Civil Procedure 60(b) on the ground that *Granholm*

created a significant change in the law since the Fifth Circuit enjoined a state durational-residency requirement in *Cooper v. McBeath* (*Cooper I*), 11 F.3d 547 (5th Cir. 1994). *Cooper II*, 820 F.3d at 734, 742. However, the Fifth Circuit disagreed. After examining the language in *Granholm*, the Fifth Circuit held that *Granholm* did not overrule or alter *Bacchus*. *Id.* at 742. And regarding *Granholm*'s statement that "state policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent," the Fifth Circuit determined that this statement did not limit scrutiny under the Commerce Clause to producers because the statement was dicta. *Id.* at 743. Instead, the Fifth Circuit "interpreted [*Granholm*] as reaffirming the applicability of the Commerce Clause to state alcohol regulations, but to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier, of the three-tier distribution system."[3] *Id.*

---

[3] The dissent argues that the Fifth Circuit misread *Granholm* because the Fifth Circuit's test would allow a court to replace the views of the state legislature with a court's own perspective. *See* Dissent Op. at 634–35. For this argument, the dissent states that *Granholm* "gave [states] 'virtually complete control' over 'how to structure th[at] . . . system.' " *Id.* (second alteration in original) (quoting *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885).

However, the dissent skews this statement in *Granholm*. First, *Granholm* itself did not grant states complete control regarding the composition of a distribution system; instead, the Supreme Court stated that *"[t]he Twenty-first Amendment* grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the

We find the Fifth Circuit's reconciliation of *Bacchus* and *Granholm* persuasive for six reasons. First, the Supreme Court explicitly declined to overrule *Bacchus* in *Granholm*. Second, in *Granholm*, the Supreme Court reiterated *Bacchus*'s concern about the protection of economic interests across state lines, suggesting that the Twenty-first Amendment does not automatically immunize a state's alcoholic-beverages law regarding wholesalers or retailers. Third, the Supreme Court emphasized that the Twenty-first Amendment does not permit a

---

liquor distribution system." *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885 (emphasis added) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). By using the word "virtually," the Supreme Court noted that there are limits to a state's power. Additionally, immediately after making this statement, the Supreme Court qualified the type of control that is acceptable: "A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system." *Id.* at 488–89, 125 S.Ct. 1885. After noting the types of restrictions that are valid, the Supreme Court declared that other "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." *Id.* at 489, 125 S.Ct. 1885. In the preceding paragraph, the Supreme Court noted that "the Twenty-first Amendment did not give the States complete freedom to regulate where other constitutional principles are at stake. . . . [T]he Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." *Id.* at 488, 125 S.Ct. 1885 (discussing *Bacchus*, *Brown-Forman*, and *Healy*). Thus, contrary to the dissent's argument, the Fifth Circuit's reasoning is in line with the Supreme Court's determinations in *Granholm*—the Twenty-first Amendment does not validate a state legislature's discriminatory laws.

state to discriminate on the basis of citizenship; accordingly, the flow of products across state lines is not the sole concern under the dormant Commerce Clause. Fourth, the Supreme Court again stated that the Commerce Clause limits the Twenty-first Amendment. Fifth, the Supreme Court also stated that there are times when the three-tier system is invalid. And lastly, *Granholm* did not limit its application of the Commerce Clause to alcoholic-beverages laws regarding producers.[4] Thus, *Bacchus* and *Granholm* are reconcilable.

First, the Supreme Court in *Granholm* explicitly declined to overrule *Bacchus*; therefore, the reasoning in *Bacchus* still stands:

> Recognizing that *Bacchus* is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear, we decline their invitation. Furthermore, *Bacchus* does not stand alone in recognizing that the Twenty-first Amendment did not give States complete freedom to regulate where other constitutional principles are at stake. A retreat from *Bacchus* would also undermine *Brown-Forman* and *Healy*. These cases invalidated state liquor regulations under the Commerce Clause. Indeed, *Healy* explicitly relied on the

---

[4] Even after the Supreme Court decided *Granholm*, we have continued to rely on *Bacchus*. *See Jelovsek*, 545 F.3d at 437 ("The parties, as well as the district court, spent a great deal of effort examining whether, and to what extent, *Granholm* applies to the cases before us. We believe *Bacchus* is also instructive in this case.").

> discriminatory character of the Connecticut price affirmation statute. 491 U.S., at 340–41 [109 S.Ct. 2491]. *Brown-Forman* and *Healy* lend significant support to the conclusion that the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge.

Granholm, 544 U.S. at 488, 125 S.Ct. 1885. Clearly, the Supreme Court refused to overrule *Bacchus* or limit *Bacchus* to its facts.

Second, in *Granholm*, the Supreme Court focused on a general Commerce Clause principle—the prohibition of discrimination against out-of-state economic interests. The Court began by discussing this general principle: "[t]ime and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.' " *Id.* at 472, 125 S.Ct. 1885 (emphasis added) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state *economic interests* over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry."[5] *Id.* at 487, 125

---

[5] The dissent seems to argue that the Commerce Clause limits only state actions regarding alcohol distribution that regulate interstate activity, not intrastate activity having an effect on interstate commerce. However, the Supreme Court's statement that "[s]tates may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses," seems to suggest otherwise.

S.Ct. 1885 (emphasis added) (quoting *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080).

Third, the Supreme Court also discussed the general principle that a state cannot bar out-of-state citizens from engaging in its economy; thus, a state's alcoholic-beverages law is not automatically valid just because it "treat[s] liquor produced out of state the same as its domestic equivalent."[6] *Id.* at 489, 125 S.Ct. 1885. The Supreme Court stated that "[t]he rule prohibiting state discrimination against

---

Granholm, 544 U.S. at 472, 125 S.Ct. 1885. Additionally, the Supreme Court has stated that "[w]hen a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, [the Supreme Court has] generally struck down the statute without further inquiry." *Id.* at 487, 125 S.Ct. 1885 (emphasis added) (quoting *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080). In *Brown-Forman*, the Supreme Court determined that the Twenty-first Amendment did not protect New York's law that required a distiller or agent to affirm that its alcohol prices were not lower in any other state because that law would have a negative economic effect in other states. *See Brown-Forman*, 476 U.S. at 585, 106 S.Ct. 2080. Here, because Tennessee is favoring in-state economic interests over out-of-state economic interests by preventing out-of-state citizens from engaging in Tennessee's economy for several years, Tennessee is not merely regulating the distribution of alcohol within its borders—it is dictating who can and cannot engage in its economy.

[6] The dissent also attempts to limit *Granholm*'s holding to the statement that a law is invalid only when it "treat[s] liquor *produced out of state* the same as its domestic equivalent." *See* Dissent Op. at 634 (quoting *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). However, the dissent does not acknowledge Section II.A in *Granholm*, which devotes two pages to the principle that a state cannot bar out-of-state citizens from engaging in its economy. *See Granholm*, 544 U.S. at 472–73, 125 S.Ct. 1885.

interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens." *Id.* at 472, 125 S.Ct. 1885. Laws cannot "deprive citizens of their right to have access to the markets of other States on equal terms." *Id.* at 473, 125 S.Ct. 1885. Additionally, the Supreme Court has "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* at 475, 125 S.Ct. 1885. For instance, in *Granholm*, the Supreme Court stated that "New York's in-state presence requirement runs contrary to [the Supreme Court's] admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.' " *Id.* at 475, 125 S.Ct. 1885 (first quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963); and then citing *Ward v. Maryland*, 12 Wall. 418, 20 L.Ed. 449 (1871)). Therefore, scrutiny under the dormant Commerce Clause is not limited to laws regarding products.

Fourth, the Supreme Court again emphasized in *Granholm* that the Commerce Clause limits a state's power under the Twenty-first Amendment. According to the Court, "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 487, 125 S.Ct. 1885 (quoting *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049). Regardless of the Twenty-first Amendment, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce

Clause." *Id.* (first citing *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049; then citing *Brown-Forman*, 476 U.S. at 573, 106 S.Ct. 2080; and then citing *Healy v. Beer Inst.*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989)). Therefore, in *Granholm*, the Supreme Court continued to recognize that the Commerce Clause does limit the Twenty-first Amendment.

Fifth, a state's alcoholic-beverages law is not immune simply because it is part of a three-tier system. In *Granholm*, New York and Michigan "argue[d] that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system." *Id.* at 488, 125 S.Ct. 1885. But the Supreme Court disagreed, noting that, although three-tier systems are "unquestionably legitimate," those systems are not valid when they "involve straightforward attempts to discriminate in favor of local producers." *Id.* at 488, 489, 125 S.Ct. 1885. Based on this language, a state's alcoholic–beverages law is not automatically valid simply because it addresses a portion of a three-tier system.[7]

---

[7] The dissent asserts that the Supreme Court "never purported to overrule its prior statements and holdings approving state authority over alcohol *distribution* as opposed to *production*." Dissent Op. at 636. And, according to the dissent, "[u]ntil the Supreme Court says so, we may not assume that the Twenty-first Amendment no longer 'create[s] an exception to the normal operation of the Commerce Clause.' " *Id.* (second alteration in original) (quoting *Capital Cities*, 467 U.S. at 712, 104 S.Ct. 2694).

But the Supreme Court has said so. In fact, it catego.ized its modern precedent into three distinct categories: (1) the Twenty-first Amendment does not protect state laws that violate other

parts of the Constitution, (2) the Twenty-first Amendment does not eliminate Congress' Commerce Clause power over alcoholic beverages, *i.e.*, "products," and (3) the Commerce Clause limits state regulation of alcohol, *i.e.*, distribution. *See Granholm*, 544 U.S. at 486–87, 125 S.Ct. 1885. The language that the Supreme Court uses to describe these boundaries is particularly compelling:

> The modern § 2 cases fall into three categories.
>
> First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment. The Court has applied this rule in the context of the First Amendment, ***44 Liquormart, Inc. v. Rhode Island***, 517 U.S. 484 [116 S.Ct. 1495, 134 L.Ed.2d 711] (1996); the Establishment Clause, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 [103 S.Ct. 505, 74 L.Ed.2d 297] (1982); the Equal Protection Clause, [*Craig v. Boren*, 429 U.S. 190, 204–09, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)]; the Due Process Clause, *Wisconsin v. Constantineau*, 400 U.S. 433 [91 S.Ct. 507, 27 L.Ed.2d 515] (1971); and the Import–Export Clause, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 [84 S.Ct. 1247, 12 L.Ed.2d 362] (1964).
>
> Second, the Court has held that § 2 does not abrogate Congress' Commerce Clause powers *with regard to liquor*. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 [104 S.Ct. 2694, 81 L.Ed.2d 580] (1984); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980). The argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause" for alcoholic beverages has been rejected. *Hostetter*, 377 U.S., at 331–332 [84 S.Ct. 1293]. Though the Court's language in *Hostetter* may have come uncommonly close to hyperbole in describing this argument as "an absurd oversimplification," "patently bizarre," and "demonstrably incorrect," *ibid.*, the basic point was sound.
>
> Finally, and most relevant to the issue at hand, the Court has held that *state regulation of alcohol is limited* by the nondiscrimination principle of the Commerce Clause. *Bacchus*, 468 U.S., at 276 [104 S.Ct. 3049]; *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S.

And lastly, the Supreme Court did not state that the Commerce Clause applies only to alcoholic-beverages laws regarding producers. The statement that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent" must be read in its context. *Id.* at 489, 125 S.Ct. 1885. The Supreme Court wrote the full paragraph as follows:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal, supra*, at 110 [100 S.Ct. 937]. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state run outlets or funnel

---

573 [106 S.Ct. 2080, 90 L.Ed.2d 552] (1986); *Healy v. Beer Institute*, 491 U.S. 324 [109 S.Ct. 2491, 105 L.Ed.2d 275] (1989). "When a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, we have generally struck down the statute without further inquiry." *Brown-Forman, supra*, at 579 [106 S.Ct. 2080].

Id. (emphasis added). Therefore, the Supreme Court has stated that the Commerce Clause applies to the production of alcoholic beverages and their distribution.

> sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S., at 432 [110 S.Ct. 1986]. See also *id.*, at 447 [110 S.Ct. 1986] (Scalia, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). ***State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.*** The instant cases, in contrast, involve straightforward attempts to ***discriminate in favor of local producers.*** The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

Id. at 488–89, 125 S.Ct. 1885 (emphasis added). A fair reading of this passage leads to one conclusion: the Supreme Court discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of "producers" simply because *Granholm* involved statutes addressing that step in the three-tier system. The Supreme Court did not give any indication that the Twenty-first Amendment automatically protects laws regarding wholesalers and retailers.

In summary, based on the language in *Granholm*, the Supreme Court's reasoning in *Bacchus* continues to apply along with *Granholm* itself. Therefore, we now examine Tennessee's durational-residency requirements in light of *Granholm* and *Bacchus*.

2. Tennessee's Interests in the Durational-Residency Requirements Are Not So Closely Related to the Powers Reserved by the Twenty-first Amendment

To determine whether the Twenty-first Amendment immunizes a state's alcoholic-beverages law from scrutiny under the dormant Commerce Clause, a court needs to examine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Bacchus*, 468 U.S. at 275–76, 104 S.Ct. 3049 (quoting *Capital Cities*, 467 U.S. at 714, 104 S.Ct. 2694).

In *Cooper I*, the Fifth Circuit examined a Texas law that required an applicant for a mixed-beverage permit to be a Texas resident for one year before submitting an application. 11 F.3d at 549, 550. The law also had a section that "include[d] what is commonly known as the '51 percent rule,' which forbids the issuance of a permit to any corporation 'unless at least 51 percent of the stock of the corporation is owned at all times by citizens who have resided within the state for a period of three years.' " *Id.* at 549. When examining the state's interest in these residency restrictions, the Fifth Circuit stated that "the state's interest in facilitating background checks of permit applicants by discriminating against nonresidents is not within the 'core concerns' of the Twenty-first Amendment." *Id.* at 555 (comparing *North Dakota*, 495 U.S. 423, 110 S.Ct. 1986). The Fifth Circuit emphasized that "[t]he

statutory barrier Texas has erected against nonresidents who wish to obtain mixed beverage permits results in shielding the State's operators from the rigors of outside competition." *Id.* Therefore, it determined that "[t]he discriminatory . . . residency requirement inherent in the challenged statutory provisions cannot stand." *Id.* at 555–56.

Then, in *Cooper II*, the Fifth Circuit bolstered its reasoning in *Cooper I* and stated that *Bacchus*'s reasoning still stands:

> In *Wine Country* [*Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010)], we interpreted [*Granholm*] as reaffirming the applicability of the Commerce Clause to state alcohol regulations, but to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier, of the three-tier distribution system. *Id.* at 820–21. State regulations of the producer tier "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." [*Granholm*], 544 U.S. at 489, 125 S.Ct. 1885. But state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor.
>
> Because of the Twenty-first Amendment, states may impose a physical-residency requirement on retailers and wholesalers of alcoholic beverages despite the fact that the residency requirements favor in-state over out-of-state businesses. *Wine Country*, 612 F.3d at

> 821. The Twenty-first Amendment does not, however, authorize states to impose a durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers. *Id.* (citing *Cooper* [*I*], 11 F.3d at 555). Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system. *See id.* at 818.

820 F.3d at 743 (footnote omitted). In this language, the Fifth Circuit created an important distinction: requiring retailer-or wholesaler-alcoholic-beverages businesses to be within the state may be essential to the three-tier system, but imposing durational-residency requirements is not, particularly when those durational-residency requirements govern owners.[8]

Here, Tennessee's durational-residency requirements are nearly identical to the requirements in *Cooper I*. In Tennessee, to obtain a retail-alcoholic-beverages permit, individuals,

---

[8] The dissent asserts that in-state distribution regulations are always discriminatory in some manner, and in some ways, the dissent is correct that "[w]hat matters is what type of discrimination is *permissible*." Dissent Op. at 634. However, the Fifth Circuit has acknowledged this dilemma, and it rectified the issue—requiring wholesalers and retailers to be in the state is permissible, but requiring owners to reside within the state for a certain period is not. *See Cooper II*, 820 F.3d at 743. Additionally, the dissent argues that *Jelovsek* has not answered this question, *see* Dissent Op. at 633–35, which is contrary to *Jelovsek*'s statement that the two-year durational-residency requirement "impermissibly favor[s] Tennessee interests at the expense of interstate commerce." *Jelovsek*, 545 F.3d at 438.

corporations, firms, directors, officers, and stockholders all need to reside within the state for two years. *See* Tenn. Code Ann. § 57-3-204(b). And although requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system, *see Cooper II*, 820 F.3d at 743, imposing durational-residency requirements is not inherent—a three-tier system can still function without these restrictions.

Tennessee's durational-residency requirements do not relate to the flow of alcoholic beverages within the state. Instead, they regulate the flow of individuals who can and cannot engage in economic activities. The Twenty-first Amendment gives a state the power to oversee the alcoholic-beverages business, but it does not give a state the power to dictate where individuals live, because a state's alcoholic-beverages laws "cannot deprive citizens of their right to have access to the markets of other States on equal terms." *Granholm*, 544 U.S. at 473, 125 S.Ct. 1885. "The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049. Therefore, the Twenty-first Amendment does not immunize Tennessee's durational-residency requirements from scrutiny under the dormant Commerce Clause.

B. Tennessee's Durational-Residency Requirements Violate the Dormant Commerce Clause

Under the Commerce Clause, Congress can "regulate Commerce . . . among the several States."

U.S. Const. art. I, § 8, cl. 3. While the Commerce Clause gives Congress authority to regulate interstate commerce, the converse is that states cannot impede Congress's power by "unjustifiably . . . discriminat[ing] against or burden[ing] the interstate flow of articles of commerce." *Or. Waste*, 511 U.S. at 98, 114 S.Ct. 1345. This dormant Commerce Clause prevents "economic protectionism"—*e.g.*, a state protecting in-state economic interests by burdening out-of-state economic interests. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 369 (6th Cir. 2013) (quoting *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)). The dormant Commerce Clause helps to "effectuate[ ] the Framers' purpose to 'prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole.' " *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330–31, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)).

"To determine whether a statute violates the Commerce Clause, [we] must first determine whether the statute discriminates against interstate commerce, either by discriminating on its face, by having a discriminatory purpose, or by discriminating in practical effect." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431–32 (6th Cir. 2008) (citing *E. Ky. Res. v. Fiscal Court*, 127 F.3d 532, 540 (6th Cir. 1997)). "If the statute is discriminatory, . . . it is virtually per se invalid, unless the state can demonstrate that it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'

" *Id.* at 432 (quoting *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). In contrast, a nondiscriminatory statute is presumed valid "unless the burdens on interstate commerce are 'clearly excessive in relation to the putative local benefits.' " *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

Because Tennessee's durational-residency requirements are facially discriminatory and there is no evidence that Tennessee cannot achieve its goals through nondiscriminatory means, we hold that § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) are unconstitutional.

1. The Durational-Residency Requirements Are Facially Discriminatory

In *Jelovsek*, we examined § 57-3-207(d) of Tennessee Code Annotated, which "require[d] a two-year Tennessee residency before a winery license may be obtained and, if the applicant is a corporation, all of the capital stock must be owned by two-year Tennessee residents." 545 F.3d at 438. When reviewing this language, we found that the provision was "discriminatory on [its] face, and in [its] purpose." *Id.* This "provision[ ] impermissibly favor[ed] Tennessee interests at the expense of interstate commerce." *Id.*

The statutory language presently before us is very similar to the statutory language that we already examined in *Jelovsek*; the relevant statute here provides the following:

> No retail license under this section may be issued to any individual: . . . Who has not been a bona fide resident of this state during the two-

> year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years[.]

Tenn. Code Ann. § 57-3-204(b)(2)(A). And the statute here imposes similar requirements on corporations:

> (A) No retail license shall be issued to any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;
>
> (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;
>
> . . . .
>
> (D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

Id. § 57-3-204(b)(3)(A)–(B), (D). Because the statute contains these durational-residency requirements, it prevents out-of-state residents from obtaining retail licenses and protects in-state residents who are retailers.[9] Therefore, we hold that § 57-3204(b)(2)(A), (3)(A)–(B), and (3)(D) are facially discriminatory.

2. Tennessee Could Achieve Its Goals with a Reasonable, Nondiscriminatory Alternative

Tennessee has provided purposes in the statute for imposing oversight of alcoholic beverages; the statute states the following:

> Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or

---

[9] Because *Jelovsek* dealt with wine production, the dissent argues that *Jelovsek* does not dictate the outcome here. *See* Dissent Op. at 633–35. Nevertheless, the language in *Jelovsek* suggests otherwise. In *Jelovsek*, this court stated that "*[o]ther provisions* of the Grape and Wine Law are discriminatory on their face, and in their purpose. For example, the Grape and Wine Law requires a two-year Tennessee residency before a winery license may be obtained and, if the applicant is a corporation, all of the capital stock must be owned by two-year Tennessee residents." *Jelovsek*, 545 F.3d at 438 (emphasis added). Although the surrounding language does discuss the portions of the statute addressing wine production, in the sentence actually examining the durational-residency requirement, this court did not use the words "product" or "producers." *See id.* Thus, this court declared that a two-year residency requirement is invalid in a statement separate and apart from any portion of the opinion addressing wine production; unlike the dissent, we cannot shrug off this holding of *Jelovsek*.

> beer, . . . it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Id. § 57-3-204(b)(4). This language asserts two legitimate purposes for the residency restrictions on retailers: (1) protecting "the health, safety and welfare" of Tennessee's citizens and (2) using a higher level of oversight and control over liquor retailers. *See North Dakota*, 495 U.S. at 432, 110 S.Ct. 1986 (identifying "the interest of promoting temperance, ensuring orderly market conditions, and raising revenue").

However, neither Byrd nor the Association argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals. And at oral argument, Fine Wines described several alternative means: requiring (1) a retailer's general manager to be a resident of the state, (2) both in-state and out-of-state retailers to post a substantial bond to receive a license, and (3) public meetings regarding the issuance of a license. Arguably, Tennessee can achieve its goals through nondiscriminatory means. For instance, it could implement technological

improvements, such as creating an electronic database to monitor liquor retailers. But neither Byrd nor the Association argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals. Therefore, Byrd and the Association have not met their burden.

In summary, the durational-residency requirements in § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) are unconstitutional because (1) they are facially discriminatory and (2) neither Byrd nor the Association has shown that a nondiscriminatory alternative cannot achieve Tennessee's goals.

C. We Sever § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) from the Rest of the Statute

"[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by (1) "enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force" or (2) "sever[ing] its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). "Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.' " *Id.* at 329, 126 S.Ct. 961 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985)). However, we must be "mindful that our constitutional mandate and institutional competence are limited," and we must "restrain ourselves from 'rewriting state law to conform it to constitutional

requirements' even as we strive to salvage it." *Id.* at 329, 126 S.Ct. 961 (quoting *Virginia v. Am. Booksellers Assn., Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)). We also must remember that "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' " *Id.* at 330, 126 S.Ct. 961 (quoting *Califano v. Westcott*, 443 U. S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979)).

"Whether a portion of a state's statute is severable is determined by the law of that state." *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 371 (6th Cir. 2006). In Tennessee, "[t]he doctrine of elision allows a court, under appropriate circumstances when consistent with the expressed legislative intent, to elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." *State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994). The Tennessee Supreme Court has stated the following regarding the doctrine:

> The doctrine of elision is not favored. The rule of elision applies if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However, a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not to be reached unless such

> conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. The inclusion of a severability clause in the statute has been held by this Court to evidence an intent on the part of the legislature to have the valid parts of the statute enforced if some other portion of the statute has been declared unconstitutional.

Id. at 830 (quoting *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985)). Tennessee's general assembly has also provided a general severability statute, which states the following:

> It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be excinded if the code would otherwise be unconstitutional or ineffective. If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause, sentence or part in any one (1) or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.

Tenn. Code Ann. § 1-3-110. Although this statute "does not automatically make [the doctrine of elision]

applicable to every situation[,] . . . when a conclusion can be reached that the legislature would have enacted the act in question with the unconstitutional portion omitted, then elision of the unconstitutional portion is appropriate." *State v. Crank*, 468 S.W.3d 15, 29 (Tenn. 2015) (quoting *In re Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999)).

Applying Tennessee's doctrine of elision, we hold that we can sever § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) from the rest of the statute. In the statute, in addition to protecting Tennessee citizens by imposing residency requirements, the legislature also stated that Tennessee wanted "to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises."[10] Tenn. Code

---

[10] By arguing that drunk driving, domestic abuse, and underage drinking are important interests, the dissent concludes that the durational-residency requirements would promote health, safety, and welfare. Dissent Op. at 633. However, in *Granholm*, the Supreme Court did not credit such blanket assertions. *See Granholm*, 544 U.S. at 489–93, 125 S.Ct. 1885 (stating that "Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods" and that "the States provide[d] little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries" to prevent underage drinking and tax evasion). In fact, even in the Supreme Court cases that the dissent cites for support, the Supreme Court required some type of evidentiary showing. *See North Dakota*, 495 U.S. at 433 & n.5, 110 S.Ct. 1986 (relying on an affidavit to conclude that "[t]he risk of diversion into the retail market and disruption of the liquor distribution system is thus both substantial and real."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (stating "that demand, and hence consumption throughout the market,

Ann. § 57-3-204(b)(4). Review of § 57-3-204 reveals that the statute contains extensive restrictions relating to this purpose. For instance, an individual cannot receive a retail license if he or she "is not twenty-one (21) years of age or older" or "has been convicted of a felony." Tenn. Code Ann. § 57-3-204(b)(2)(B), (D). Additionally, portions of the statute relate to application fees. *See* Tenn. Code Ann. § 57-3-204(b)(1). Because the statute contains various provisions that are unrelated to the durational-residency requirements and that relate to the legislature's purpose, we sever the unconstitutional durational-residency provisions, *i.e.*, § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D), from the rest of the statute.[11]

---

is somewhat lower whenever a higher, noncompetitive price level prevails. However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance."). Therefore, these blanket assertions in the statute are not enough, and Tennessee has not provided any evidence that the durational-residency requirements will promote its alleged interests.

[11] According to the dissent, requiring 51% of stockholders to satisfy the durational-residency requirements is valid, *see* Dissent Op. at 635, but the dissent fails to acknowledge that a 51% requirement impermissibly stifles interstate commerce. For instance, the Supreme Court has "struck down a New York law that imposed a higher tax on transfers of stock occurring outside the State than on transfers involving a sale within the State" because "the Commerce Clause limits the manner in which States may legitimately compete for interstate trade, for 'in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " *Bacchus*, 468 U.S. at 272, 104

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) in violation of the

---

S.Ct. 3049 (quoting *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977)). The Supreme Court has also "struck down the Illinois Business Takeover Act, which required that a takeover offer for a target company having a specified connection to Illinois be registered with the Secretary of State and mandated that such an offer was not to become effective for 20 days, during which time the offer would be subject to administrative evaluation" because "if Illinois were free to enact such legislation, others [sic] States similarly were so empowered, 'and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.' " *Healy*, 491 U.S. at 333 n.9, 109 S.Ct. 2491 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982)). Thus, because imposing durational-residency requirements on stockholders prevents shares from freely flowing throughout states, a 51 % requirement still allows a state to engage in economic protectionism.

Additionally, the dissent concludes that the ten-year requirement is the "epitome of arbitrariness" because "[T]ennessee offered no reason why a person who has resided in the State for two years is deemed local enough to begin operating a retailer in year 3, but not local enough to continue running it in year 4." Dissent Op. at 635. But, the dissent's argument also applies to the two-year requirement because, as previously discussed, Tennessee has offered no evidence to prove that the two-year requirement advances its goals. What makes two the magic number? Why is one year not enough? What about a six-month requirement? Without answers to these questions, the two-year requirement is also "the epitome of arbitrariness." Furthermore, in *Jelovsek*, 545 F.3d at 438, this court already determined that a two-year residency requirement is invalid.

dormant Commerce Clause and **SEVER** those provisions from the Tennessee statute.

SUTTON, Circuit Judge, concurring in part and dissenting in part.

Tennessee requires sellers of alcohol to have a retail license. To obtain a license, the applicant, including any officers and directors, must be "a bona fide resident of th[e] state during the two-year period immediately preceding" the application. Tenn. Code Ann. §§ 57-3-204(b)(2)(A), (b)(3)(A). The licensing requirement applies to all sales of alcohol in the State, whether the alcohol was produced in Tennessee or elsewhere. I would uphold these modest requirements, as the text of the Twenty-first Amendment, the original understanding of that provision's relationship to the Commerce Clause, modern U.S. Supreme Court precedent, and a recent Eighth Circuit decision (concerning a similar Missouri residency requirement) all support their validity. The majority viewing it differently, I respectfully dissent from this part of its decision and agree with its other conclusions.

Constitutional text. The language of the pertinent constitutional provisions supports Tennessee's right to impose this requirement. At the outset, the U.S. Constitution gave Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, and impliedly prohibited States from doing the same, *see* Albert Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 485 (1941); 2 The Records of the Federal Convention of 1787, at 625 (Max Farrand ed. 1966) (James Madison grew "more & more convinced" that the regulation of commerce among the States "was in

its nature indivisible and ought to be wholly under one authority."). Whatever else this Tennessee requirement does, it does not purport to displace or contradict congressional regulation of commerce among the States. It merely announces a limited requirement for in-state sales of alcohol.

The end of Prohibition in 1933 made the States' authority over this issue more clear. In repealing the Eighteenth Amendment, the Twenty-first Amendment allowed the States to regulate alcohol as a unique commercial article. Unlike any other provision in the U.S. Constitution, it sets up what is largely a regulatory regime of one: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." U.S. Const. amend. XXI, § 2 (emphasis added). After 1933, then, a State could continue to prohibit sales of alcohol within its territory. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 84 L.Ed. 128 (1939). Or it could allow sales of alcohol on its own commercial terms, say by permitting only some types of alcohol to be sold within the State or by permitting sales only through state-run retailers or by permitting sales only through some other distribution system. The language of the amendment—prohibiting the "delivery or use" of alcohol "in violation of the laws" of each State—empowers States to regulate sales of alcohol within their borders. A two-year residency requirement to obtain a license to own a brick-and-mortar retail store, like a two-year residency requirement to operate a state-owned retail

store, fits within the core authority delegated to the States by the Twenty-first Amendment.

History. A few screen shots of history support this interpretation. The itinerant regulation of alcohol over time captures the itinerant relationship between the power of the National Government and the States over time. Most areas of federal and state authority, including over commerce, initially were deemed largely exclusive, as a review of the enumerated powers delegated to Congress in Article I, Section 8 suggests. If Congress had authority over a form of commerce, the States usually did not. So too in the other direction. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–89, 197–200, 6 L.Ed. 23 (1824); *id.* at 226–27 (Johnson, J., concurring); *see also Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part) ("The pre-emption of state legislation would automatically follow, of course, if the grant of power to Congress to regulate interstate commerce were exclusive . . . as John Marshall at one point seemed to believe it was."). Largely exclusive spheres of authority, not largely overlapping spheres of authority, thus were the initial order of the day.

But the congressional sphere of authority grew over time, as more and more "commerce" was treated as "among the several States." Even before Prohibition in 1920, the definition of interstate commerce had come to mean that the regulation of most products, including alcohol, was increasingly a matter of state *and* federal law. *See, e.g., Leisy v. Hardin*, 135 U.S. 100, 121–23, 10 S.Ct. 681, 34 L.Ed. 128 (1890). That helps to explain the federal laws

concerning sales of alcohol before Prohibition. Although the Supreme Court had held that the States could "regulat[e] and restrain[ ] the traffic" in liquor, including by "prohibiting it altogether," *The License Cases*, 46 U.S. (5 How.) 504, 577, 12 L.Ed. 256 (1847), it also held that they could not interfere with the liquor traffic "in the absence of congressional permission to do so," *Leisy*, 135 U.S. at 118, 124–25, 10 S.Ct. 681. Those rulings spawned a series of congressional attempts to bolster state authority. *See* Wilson Act of 1890, 27 U.S.C. § 121; Webb-Kenyon Act of 1913, 27 U.S.C. § 122. They were largely unsuccessful. One reason was that the Court held that the Commerce Clause prohibited a dry State from regulating unopened packages of alcohol—even though destined for illegal consumption in the State—because unopened packages remained articles of commerce. *Rhodes v. Iowa*, 170 U.S. 412, 426, 18 S.Ct. 664, 42 L.Ed. 1088 (1898).

This federal-state interplay also helps to explain the language of the Eighteenth Amendment, which first established that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. Const. amend. XVIII, § 1. Section 2 of the Amendment then clarified overlapping federal and state authority to enforce Prohibition: "The Congress and the several States shall have *concurrent power* to enforce this article by appropriate legislation."

With the passage of the Twenty-first Amendment, the States and Federal Government both had some regulatory power over alcohol but generally were thought to regulate it exclusively in different ways. *Compare Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394, 59 S.Ct. 254, 83 L.Ed. 243 (1939) (upholding Michigan statute prohibiting the sale of out-of-state beer against Commerce Clause challenge), *with William Jameson Co., Inc. v. Morgenthau*, 307 U.S. 171, 172–73, 59 S.Ct. 804, 83 L.Ed. 1189 (1939) (per curiam) (upholding Federal Alcohol Administration Act's labeling requirements against Twenty-first Amendment challenge). From the vista of 1933, a lawyer (and judge) would have presumed that the regulation of sales of alcohol *within* the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power given the existing paradigm of largely separate and exclusive spheres of regulatory power.

But over the next ten years, the Court's understanding of the Commerce Clause power changed. By the early 1940s, it was no longer true that regulations of commerce in the main were exclusively federal or exclusively state. The growth of the national commerce power, through the development of the "substantial effects" test, *Wickard v. Filburn*, 317 U.S. 111, 128–29, 63 S.Ct. 82, 87 L.Ed. 122 (1942), eliminated many (but not all) distinctions between intrastate and interstate commerce, making most businesses potentially subject to state *and* national regulation. The question was no longer "whether the right government was acting within the right sphere." *Am.*

Beverage Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring) (quoting *Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 257).

That development altered the nature of the *implied* restrictions on state authority established by the Commerce Clause. An exclusive delegation of power to one sovereign implies a ban on assertions of power by another sovereign over the same matter. Just as Congress's exclusive power to "coin Money" implied a lack of state authority to do the same, U.S. Const. art. I, § 8, cl. 5, Congress's exclusive power to regulate interstate commerce among the States implied a lack of state power in the area. *See Smith v. Turner*, 48 U.S. (7 How.) 283, 393–96, 12 L.Ed. 702 (1849) (McLean, J.); The Federalist No. 42, at 263 (James Madison) (Clinton Rossiter ed. 2003); *but see Tyler Pipe*, 483 U.S. at 261, 107 S.Ct. 2810 (Scalia, J., concurring in part and dissenting in part). Hence the need for the Court to create implied/negative/dormant Commerce Clause limitations on state authority, which was the only way to preserve the Federal Government's largely exclusive regulatory power over interstate commerce.

At their creation, the Court's dormant Commerce Clause cases were not just appropriate but necessary, as they provided the only way to keep the States on the one hand and Congress on the other in their separate and exclusive spheres of regulatory authority. But in a post-1930s world, in which the National Government and States largely have *overlapping* power over most sectors of commerce, the implementation of an implied restriction on state

authority is much more difficult to articulate and police.

Which is what makes this case interesting—and complicated. From the vantage point of the understanding of the Commerce Clause circa 1933, the case looks easy. That's why Justice Brandeis in 1936 would describe the States' authority to regulate sales of alcohol in such sweeping terms:

> The words used [in § 2] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62, 57 S.Ct. 77, 81 L.Ed. 38 (1936). In the Court's view at that point, the Twenty-first Amendment gave the States what looked like largely plenary commercial authority (save for violations of individual rights guarantees, such as the Fourteenth Amendment) to regulate sales of alcohol within their borders, including in ways that the Commerce Clause would not otherwise allow. *Id.*

The congressional stance on regulation of alcohol at the time suggests a similar understanding. In the

immediate aftermath of the Twenty-first Amendment's ratification, Congress overhauled Title 27 of the U.S. Code—"Intoxicating Liquors"—by repealing Chapters 1, 2, 4, 5, and 9 (dealing with production, transportation, and sale of liquor). 27 U.S.C. §§ 1–108, 221–28. Chapter 6, which includes the Wilson Act of 1890 (§ 121), Webb-Kenyon Act of 1913 (§ 122), and, many years later, the Twenty-first Amendment Enforcement Act of 2000 (§ 122a), all bolster state authority over alcohol. *See, e.g., id.* § 122a(b)–(c) (authorizing state Attorneys General to bring civil actions in federal court to enjoin "any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor"). Chapter 8, the last enclave of federal oversight, concerns things like labeling. Federal Alcohol Administration Act, 27 U.S.C. §§ 201 et seq. But it leaves "transportation [and] importation . . . for delivery or use" (i.e., distribution) to the States, U.S. Const. amend. XXI, § 2, and even incorporates state-law requirements, like Tennessee's two-year residency rule for officers and directors, *see* 27 U.S.C. §§ 204(a)(2)(C), 204(d), 208(b)(2).

At the time the Twenty-first Amendment was ratified, a State's greater authority to ban all alcohol sales in the State included a lesser authority to regulate sales of alcohol in the State with a heavy hand. *Ziffrin*, 308 U.S. at 138, 60 S.Ct. 163. Another way of putting it is this: The existence of the Commerce Clause *and* the Twenty-first Amendment makes it more difficult to imply a restriction on state authority (to regulate commerce) expressly created in another constitutional provision (to regulate retail sales of alcohol).

Modern U.S. Supreme Court precedent. The Court's more recent decisions in this area should be read against this backdrop, and are easier to follow (to my mind) in that context. Even if the meaning of the relevant constitutional provisions has migrated over the years, perhaps to account for the continued integration of domestic and international commerce, today's precedents still give the States authority to impose residency requirements on the owners of retail establishments that sell beer, wine, or liquor.

A consensus remains that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). While the size of that exception may be fickle, a few constant rules remain. On one side of the ledger, the Commerce Clause still limits state efforts to regulate activity outside of a State's territorial domain. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 343, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (invalidating price-affirmation statute regulating liquor sales in other States); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 273, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (invalidating discriminatory tax on out-of-state liquor); *Capital Cities*, 467 U.S. at 714, 104 S.Ct. 2694 (invalidating ban on TV wine ads emanating from other States); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (invalidating resale price maintenance and price posting statutes); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964) (invalidating regulation of alcohol passing through

JFK Airport that would not be used until arrival at international destination); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 533–34, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938) (invalidating state restriction on shipments to a federal enclave in its borders).

On the other side of the ledger, exceptions to the normal operation of the Commerce Clause remain alive and well in some areas—in particular the in-state nature of alcohol distribution. The States retain "virtually complete control" over "how to structure the[ir] liquor distribution system[s]." *Granholm v. Heald*, 544 U.S. 460, 488, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). All thus agree that the States retain authority (1) to ban alcohol completely, (2) to distribute liquor exclusively through state-run monopolies, or (3) to operate distribution systems, including through regulations that require retailers and wholesalers to reside in-state. *Id.* at 489, 125 S.Ct. 1885. Because liquor distribution implicates the States' core interests after the repeal of Prohibition, such regulations are generally "protected under [§ 2] when they treat liquor produced out of state the same as its domestic equivalent." *Id.* State authority in this area is "virtually" limitless, at least when it comes to the Commerce Clause. *Id.* at 488, 125 S.Ct. 1885. State regulations of in-state distribution, even if facially discriminatory, are constitutional unless a challenger can show that they serve no purpose besides "economic protectionism." *Bacchus*, 468 U.S. at 276, 104 S.Ct. 3049.

Measured by these standards and cases, Tennessee's two-year residency requirement should survive. We must start with the assumption that tiered distribution systems are "unquestionably

legitimate." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885. As part of these systems, the States may require retailers and wholesalers to reside within their borders. *See id.* And if the States may do that, they must "have flexibility to define the requisite degree of 'in-state' presence" necessary for participating as a retailer or wholesaler. *S. Wine & Spirits v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013). Tennessee's two-year residency rule and its application of that rule to a retailer's officers and directors lawfully exercise that authority.

Promoting responsible consumption and orderly liquor markets "fall within the core of [Tennessee's] power" under § 2. *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990). Retailers are critical to serving those interests. Because they form the final link in the distribution chain, retailers are closest to the local risks that come with selling alcohol, such as "drunk driving, domestic abuse, [and] underage drinking." *S. Wine & Spirits*, 731 F.3d at 811. Tennessee reasonably concluded that requiring retailers to reside in the communities that they serve would further "health, safety and welfare." Tenn. Code Ann. § 57-3-204(b)(4). Tennessee's method for establishing in-state residency also makes sense. Requiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare. The only way to know a community is to live there, which may explain why Congress requires federal court of appeals judges to live within their circuits, 28 U.S.C. § 44(c), and

district court judges to live within their districts, *id.* § 134(b).

The same is true with respect to a residency requirement for officers and directors of the retailer. It ensures that they are familiar with the community and in a position to alter or influence the retailer's behavior based on that understanding. *See* Tenn. Code Ann. §§ 48-18-101(b), 301(b)(1), 402, 403(b)(1). The Federal Alcohol Administration Act, notably, also regulates officers and directors of liquor companies. *See, e.g.*, 27 U.S.C. § 208.

Court of appeals precedents. The post-*Granholm* circuit precedents likewise support this conclusion. Several courts agree that *Granholm* drew a line between regulation of (out-of-state) producers and regulation of (in-state) wholesalers and retailers, requiring rigorous review of the former and deferential review of the latter. *See Freeman v. Corzine*, 629 F.3d 146, 158 (3d Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 189 (2d Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006); *cf. Cooper v. Tex. Alcoholic Beverage Comm'n (Cooper II)*, 820 F.3d 730, 743 (5th Cir. 2016) (dormant Commerce Clause applies "to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier").

One circuit has approved requirements nearly identical to Tennessee's. In a thoughtful opinion by Judge Colloton, the Eighth Circuit upheld a three-year residency requirement in Missouri for wholesalers' officers, directors, and 60% of their stockholders. *S. Wine & Spirits*, 731 F.3d at 802–03.

We should do the same for Tennessee's two-year requirement.

Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008), does not change things. That case, it is true, invalidated a law that "requir[ed] a two-year Tennessee residency." *Id.* at 438. But the requirement applied only to wine *production*. *See* Grape and Wine Law, Tenn. Code Ann. § 57-3-207 (regulating "winer[ies]" and "farm wine producer[s]"). It thus did not "treat liquor *produced out of state* the same as its domestic equivalent." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (emphasis added). State laws that *do* treat out-of-state products the same, like Tennessee's retail residency rules, are generally "protected under the Twenty-first Amendment." *Id.*

Isn't it still true that the requirements here are "discriminatory on their face," just like the ones in *Jelovsek*? But in-state distribution regulations in one sense always discriminate against out-of-state interests, as *Granholm* illustrates. *See* 544 U.S. at 466, 489, 125 S.Ct. 1885; *id.* at 517–19, 521–22, 125 S.Ct. 1885 (Thomas, J., dissenting). At the same time, however, such regulations may serve a State's core concerns under the Twenty-first Amendment—for instance, by reducing in-state supply, increasing the price of liquor, or even regulating it in a way that increases (or limits decreases in) the price of liquor. *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–05, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). It thus does not matter whether an in-state distribution regulation discriminates against out-of-state interests. What matters is what type of discrimination is *permissible*. This one is, and *Jelovsek* says nothing about that question.

The Fifth Circuit, I acknowledge, refused to enforce a residency requirement for holders of a "mixed beverage permit" and 51% of their stockholders. *Cooper II*, 820 F.3d at 734–35; *see* Tex. Alcoholic Bev. Code Ann. § 28.01. In *Cooper II*, the Texas Package Stores Association asked the court to grant relief from a twenty-five-year-old injunction that allowed a Texas strip club to retain its permit after it was acquired by owners living in Florida and Tennessee. *See* Fed. R. Civ. P. 60(b)(5). The Fifth Circuit denied relief because *Granholm* did not effect "a significant change in decisional law." *Cooper II*, 820 F.3d at 740–41.

Putting this unusual posture to the side, the Fifth Circuit appears to have misread *Granholm* when it concluded that "[d]istinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of" a State's distribution system. *Id.* at 743. Because "[t]here is no archetypal three-tier system from which [to glean] the 'integral' or 'inherent' elements," the Fifth Circuit's test creates the risk that a court will unnecessarily substitute its own judgment for that of a state legislature about the best policies for regulating liquor. *S. Wine & Spirits*, 731 F.3d at 810. *Granholm* did more than authorize States to maintain some sort of liquor distribution system; it gave them "virtually complete control" over "how to structure th[at] . . . system." *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885. It matters not that one can imagine other ways a distribution system could function because "[t]here is no narrow tailoring requirement under the Twenty-first Amendment." *S. Wine & Spirits*, 731 F.3d at 812.

I agree with my colleagues, however, that two aspects of Tennessee's scheme must fall: its application of the residency requirement to 100% of a retailer's stockholders, Tenn. Code Ann. § 57-3-204(b)(3)(A), (B), (D), and its imposition of a ten-year residency requirement for renewal of a license, *id.* § 57-3-204(b)(2)(A).

A requirement that every stockholder reside in Tennessee does not further the State's interest in responsible retailers. Tennessee's Business Corporations Act states that company management—directors and officers—shall exercise "[a]ll corporate powers." *Id.* §§ 48-18-101(b), 402; *see also id.* § 48-18-101(c). While stockholders still may exert influence over their agents, 51% of the stockholders—not 100%—is usually all it takes to do so. Unlike Missouri, Tennessee did not focus on closely held corporations or require a simple- or super-majority of stockholders to be residents. *See S. Wine & Spirits*, 731 F.3d at 802–03 (citing Mo. Rev. Stat. § 311.060.3). I see no way to explain this all-or-nothing-at-all stockholder requirement as doing anything other than promoting economic protectionism.

The same goes for Tennessee's residency rule for renewal of a license. Although Tennessee grants an initial retail license after two years of in-state residence, it grants renewal of that very license only after *ten* years of residence. Tenn. Code Ann. § 57-3-204(b)(2)(A). Tennessee offered no reason why a person who has resided in the State for two years is deemed local enough to begin operating a retailer in year 3, but not local enough to continue running it in year 4. Even that might not have been a problem if

initial licenses lasted for ten years. But the retail license "expire[s] twelve (12) months following the date of its issuance." *Id.* § 57-3-213(a). That is the epitome of arbitrariness.

The court offers two key responses to my conclusion that Tennessee's two-year residency requirement for alcohol retailers does not violate the Constitution. One involves history. The court is right that *Granholm* "conducted an extensive historical analysis." *Supra* at 614 n.2. My point is that *Granholm* focused on the history in the run-up to Prohibition and concluded that, by constitutionalizing the Wilson and Webb-Kenyon Acts, the Twenty-first Amendment incorporated a pre-existing anti-discrimination principle. *See* 544 U.S. at 476–86, 125 S.Ct. 1885. That's why the Court distanced itself from the sweeping language in *Young's Market*. But that principle concerned discrimination against out-of-state *products*. *See* Wilson Act, 27 U.S.C. § 121 (making all imported liquors "subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such . . . liquors had been *produced* in such State"); *Granholm*, 544 U.S. at 483–84, 125 S.Ct. 1885 ("The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor *produced* out of state."); *id.* at 486, 125 S.Ct. 1885 ("[T]he Twenty-first Amendment . . . does not displace the rule that States may not give a discriminatory preference to their own *producers*.") (emphases added). It is *that* history that was at issue in *Granholm*. Even if we can no longer read *Young's Market* for all it is worth,

the Court never purported to overrule its other decisions and holdings approving state authority over alcohol *distribution* as opposed to *production*.

The court's second response is of a piece—to focus on language from *Granholm* (in truth one sentence from *Granholm*) to suggest that traditional dormant Commerce Clause principles apply in full to liquor production *and* distribution, notwithstanding the Twenty-first Amendment. *See supra* at 614–15 n.2, 619 & n.5, 620–21 n.7 (quoting 544 U.S. at 487, 125 S.Ct. 1885). That cuts to the heart of the debate: Did *Granholm* mean to treat alcohol, including distribution of alcohol, like any other commodity when it comes to the Commerce Clause? If so, the court is right. But as I see it, the text of the Twenty-first Amendment, the history of alcohol regulation in this country, Supreme Court and circuit court precedent, and *Granholm* itself all point in the other direction. Until the Supreme Court says so, we may not assume that the Twenty-first Amendment no longer "create[s] an exception to the normal operation of the Commerce Clause." *Capital Cities*, 467 U.S. at 712, 104 S.Ct. 2694. "An extension of this sort is not for us to make." *Arnold's Wines*, 571 F.3d at 201 (Calabresi, J., concurring).

For these reasons, I respectfully concur in part and dissent in part.

APPENDIX B

Clayton BYRD in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, et al.,

Plaintiffs,

v.

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Defendant.

Case No. 3:16–cv–02738

United States District Court, Tennessee, Nashville Division, Nashville Division.

Signed 04/14/2017

MEMORANDUM

Judge Sharp

Pending before the Court is Plaintiff[1] Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) ("Tennessee Fine Wines")

[1] The parties in this suit are labeled as either plaintiff or defendant pursuant to this Court's Order realigning the parties. (Docket No. 53 at 1, ¶ 2).

Motion for Partial Summary Judgment, (Docket No. 55), to which Plaintiff Clayton Byrd ("Byrd") and Defendant Tennessee Wine and Spirits Retailers Association ("Association") have filed Responses in Opposition, (Docket Nos. 73, 90), and Plaintiff Tennessee Fine Wines has replied, (Docket Nos. 76, 95). For the reasons set forth below, the Court will grant Plaintiff Tennessee Fine Wines' Motion.

BACKGROUND

The relevant facts are undisputed for present purposes and are as follows:

Plaintiff Byrd is the Executive Director of the Tennessee Alcoholic Beverage Commission ("the Commission"), a Tennessee state agency tasked with licensing the sale and delivery of alcoholic beverages. Plaintiff Byrd filed this action seeking a declaratory judgment regarding the constitutionality of the residency requirement for issuing a retail license outlined in Tenn. Code Ann. § 57–3–204(b)(2)(A). (Docket No. 1–1). Plaintiff Tennessee Fine Wines is a Tennessee limited liability company whose members are not residents of Tennessee. It seeks to own and operate one or more retail liquor stores, referred to as retail package stores, in Tennessee.

On July 5, 2016, Plaintiff Tennessee Fine Wines filed an application with the Commission for a new retail package store to be located in Nashville, Tennessee. Plaintiff Tennessee Fine Wines asserts that its representatives met with the Commission's staff, including Plaintiff Byrd, to discuss its plan to apply for a retail package store license prior to filing its application. It further asserts that those discussions included whether the residency

requirements would preclude it from obtaining a license. Plaintiff Byrd disputes having met with representatives of Tennessee Fine Wines prior to the submission of its application. The Commission's staff advised Plaintiff Tennessee Fine Wines that, in light of two opinions by the Tennessee Attorney General that the residency requirements are unconstitutional, the Commission has not enforced the residency requirements and has licensed nonresidents in the past. The Commission's staff recommended that the Commission approve Plaintiff Tennessee Fine Wines' application, subject to certain conditions. The Commission twice deferred its vote on Plaintiff Tennessee Fine Wines' application for a retail package store license, the last time being indefinitely until the Court resolves Plaintiff Byrd's declaratory action.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, this Court is required to grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiff Tennessee Fine Wines' Motion for Partial Summary Judgment presents pure issues of law, which are appropriate for resolution at the summary judgment stage.

LEGAL ANALYSIS

The Commission issues retail package store licenses pursuant to Tenn. Code Ann. § 57–3–204 and other statutory provisions. Tenn. Code Ann. § 57–3–204 contains residency requirements that prohibit the Commission from issuing retail package

store licenses to nonresidents. Specifically, when it comes to issuing a license to an individual, the statute provides in pertinent part that:

> No retail license under this section may be issued to any individual: Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years[.]

T.C.A.§ 57-3-204(b)(2)(A). Furthermore, with respect to corporations, the statute states, *inter alia*, that:

> The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to any corporation unless such corporation meets the following requirements:
>
> (A) No retail license shall be issued to any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;
>
> (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the

> commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;

T.C.A. § 57–3–204(b)(3)(A)–(B).

Plaintiff Tennessee Fine Wines argues that the residency requirements are unconstitutional because they violate the Commerce Clause as well as the Privileges and Immunities Clause of the United States Constitution. Because the relevant facts are undisputed, this case presents a strictly legal question as to whether Plaintiff Tennessee Fine Wines is entitled to summary judgment as a matter of law. It is.

I. Commerce Clause

The Commerce Clause of the U.S. Constitution both expressly grants Congress the power to regulate commerce among the several States, *see* U.S. Const. art. I, § 8, cl. 3, and implicitly limits the States' power to discriminate against interstate commerce. *See, e.g.*, *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). The Commerce Clause's negative implication—also known as the dormant Commerce Clause—arises from a concern over "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Jelovsek v. Bredesen*, 545 F.3d 431, 435 (6th Cir. 2008) (citing *New Energy*, 486 U.S. at 273–74, 108 S.Ct. 1803). "[I]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits

the former and burdens the latter.' " *Granholm v. Heald*, 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (citing *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)).

Dormant Commerce Clause challenges proceed under a two-tiered analysis. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010). Under the first tier, a court determines whether "a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 369–70 (6th Cir. 2013) (internal quotation marks and citation omitted). To prevail, a plaintiff must satisfy its burden of showing that a state regulation discriminates against out-of-state interests either "(a) facially, (b) purposefully, or (c) in practical effect." *Id.* at 370 (internal quotation marks and citations omitted). "If the plaintiff satisfies its burden, then 'a discriminatory law is virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " *Id.* (citation omitted). Under the second tier, if the challenged state regulation is neither extraterritorial nor discriminatory, then a court applies the Supreme Court's balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). *Id.* Under *Pike*, a court should uphold the challenged state regulation "unless the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local

benefits.' " *Id.* (internal quotation marks and citation omitted).

A. The residency requirements are facially discriminatory

Plaintiff Tennessee Fine Wines argues that the residency requirements are discriminatory on their face. For support, it relies on *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008). In that case, the Sixth Circuit vacated the district court's finding as to certain Tennessee laws concerning the wine industry. *Jelovsek*, 545 F.3d at 433. The Sixth Circuit held certain provisions of Tennessee's Grape and Wine Law to be "discriminatory on their face," "impermissibly favor[ing] Tennessee interests at the expense of interstate commerce." *Id.* Among those provisions was Tenn. Code Ann. § 57–3–207(d), which provided:

> No winery license shall be issued except to individuals *who are residents of the state of Tennessee and have been for at least two (2) years next preceding residents of the state*, ... A winery license may, in the discretion of the commission, be issued to a corporation *only if all of the capital stock of such corporation is owned by individuals who have been residents of Tennessee for not less than two (2) years preceding* ....

T.C.A. § 57–3–207(d) (2008) (emphasis added). Plaintiff Tennessee Fine Wines argues that, because the residency requirements for a retail package store license are nearly identical to the residency requirements for a winery license invalidated in *Jelovsek*, they are facially discriminatory and *per se*

invalid unless they advance a legitimate local purpose not adequately served by reasonable nondiscriminatory alternatives. Plaintiff Byrd and Defendant Association, however, argue that the state of Tennessee, pursuant to the Twenty-first Amendment, may impose such residency requirements.

Section 2 of the Twenty-first Amendment states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. However, it is axiomatic that even though the States have the right to regulate alcoholic beverages within their borders, that right is not plenary. *See Jelovsek*, 545 F.3d at 436 (citing *Granholm*, 544 U.S. at 484, 125 S.Ct. 1885) (" '[T]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods ...."); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (finding a state's liquor tax exemption for certain locally produced products violative of the Commerce Clause and stating that "[t]he central purpose of [Section 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition."). Because "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *Granholm*, 544 U.S. at 487, 125 S.Ct. 1885,

the Court is tasked with determining whether the residency requirements at issue run afoul of the Commerce Clause or are saved by the Twenty-first Amendment.

Plaintiff Byrd and Defendant Association contend that Tennessee's residency requirements for those seeking a retail package store license are protected under the Twenty-first Amendment because the residency requirements are simply part of the retail tier of Tennessee's three-tier regulatory scheme governing who may sell liquor within its borders.[2] (Docket No. 73 at 10; Docket No. 90 at 11–13). They rely on *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) for support.

In *Granholm*, the Supreme Court invalidated—on Commerce Clause grounds—laws in New York and Michigan that permitted in-state wineries, but restricted the ability of out-of-state wineries, to ship alcohol directly to consumers. In rejecting those States' argument that striking down their direct-shipment laws "would call into question the constitutionality of the three-tier system," the Court offered dicta[3] that Plaintiff Byrd and Defendant

---

[2] Tennessee's three-tier alcohol distribution system consists of (1) manufacturers, who sell to (2) licensed distributors/wholesalers, who in turn sell to (3) licensed retailers, who in turn sell to consumers.

[3] The Court recognizes Defendant Association's argument that this Court still needs to follow Supreme Court dicta. *See Am. Civil Liberties Union of Kentucky v. McCreary Cty., Ky.*, 607 F.3d 439, 447 (6th Cir. 2010) ("Lower courts are 'obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.' ") (citation omitted).

Association find particularly meaningful. *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885. It stated, " 'The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' " *Id.* (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). The Court further observed that "[it has] previously recognized that the three-tier system itself is 'unquestionably legitimate.' " *Id.* at 489, 125 S.Ct. 1885 (citing *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990)). The Supreme Court then stated that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers." *Id.* The Court ultimately held that "[t]he differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce." *Id.* at 467, 125 S.Ct. 1885.

Therefore, Plaintiff Byrd and Defendant Association argue that *Granholm* stands for the proposition that "as long as a state statute does not discriminate against nonresident *liquor producers or products* with its three-tier system, the statute is protected from Commerce Clause challenges." (Docket No. 73 at 7) (emphasis added); (*see* Docket No. 90 at 11–13). Under those circumstances, they

---

However, the Court disagrees with Plaintiff Byrd's and Defendant Association's interpretation of the relevant dicta.

argue "the Commerce Clause is not implicated and no balancing under Commerce Clause jurisprudence is necessary" and "nothing in *Granholm* stands as a limitation on the State's powers under the Twenty-first Amendment." (Docket No. 73 at 11; Docket No. 90 at 13). The way in which other courts have interpreted *Granholm* supports Plaintiff Byrd's and Defendant Association's position.

In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), the Second Circuit upheld, against a Commerce Clause challenge, a New York statutory provision that permitted New York-licensed retailers, but not out-of-state retailers, to deliver liquor directly to New York residents. The Second Circuit stated, "*Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic beverages under the Twenty-first Amendment." *Arnold's Wines*, 571 F.3d at 190. It continued, "It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause." *Id.* (citing *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 and *Brooks v. Vassar*, 462 F.3d 341, 351–53 (4th Cir. 2006)).

Applying its understanding of *Granholm* to the New York law, the Second Circuit stated that the challenged provisions did not distinguish between liquor produced out of state and liquor produced in New York because licensed in-state retailers could ship both kinds directly to New York consumers. *Id.* Because the law "treat[ed] in-state and out-of-state liquor evenhandedly under the state's three-tier

system[, requiring both to pass through it], ... [it] complie[d] with *Granholm's* nondiscrimination principle." *Id.* The Second Circuit also stated that the challenge to the provisions "requiring all wholesalers and retailers be present in and licensed by the state... is a frontal attack on the constitutionality of the three-tier system itself[,]" which is "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system." *Id.* at 190–91; *see Brooks*, 462 F.3d at 352 (stating that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself."). Having concluded that New York's three-tier system did not discriminate against out-of-state producers or products, the Second Circuit declined to analyze the challenged law further under the Commerce Clause. *Arnold's Wines*, 571 F.3d at 191.

In *Southern Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), the Eighth Circuit held that Missouri's residency requirement to obtain a wholesale liquor license was permissible under the Twenty-first Amendment and the dormant Commerce Clause. There, the Eighth Circuit stated that *Granholm* "drew a bright line between the producer tier and the rest of the system," and endorsed the Second Circuit's approach in *Arnold's Wines* of not analyzing further, under Commerce Clause principles, a state regulation that does not discriminate against liquor

products or producers from out-of-state.[4] *Southern Wine*, 731 F.3d at 810. It characterized *Granholm*'s guidance as follows: "The three-tier system is 'unquestionably legitimate,' ... and that system includes the 'licensed in-state wholesaler.'" *Id.* at 809 (citing *Granholm*, 544 U.S. at 489, 125S.Ct. 1885 (quoting *North Dakota*, 495 U.S. at 432, 447, 110 S.Ct. 1986 (Scalia, J., concurring in the judgment) ("The Twenty-first Amendment...empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."))).

Applying its view of *Granholm* to the wholesaler residency requirement, the Eighth Circuit determined that it was not discriminatory towards out-of-state liquor producers or products. *Id.* at 810. The Eighth Circuit stated that the residency requirement merely defined "the extent of in-state presence required to qualify as a wholesaler in the three-tier system." *Id.* at 809–10. It further reasoned:

> If it is beyond question that States may require wholesalers to be "in-state" without running afoul of the Commerce Clause, *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), then we think States have flexibility to define the requisite degree of "in-state" presence to include the in-state residence of wholesalers'

---

[4] However, the Eighth Circuit still considered the interests of Missouri, albeit deferentially. *See Southern Wine*, 731 F.3d at 810–11 ("If, despite the 'protected' status promised by *Granholm*, state policies defining the three-tier system are subject to deferential scrutiny, Missouri's law passes muster.").

> directors and officers, and a super-majority of their shareholders.

Id. at 810.

Notwithstanding *Arnold's Wines* and *Southern Wine*, the Court agrees with Plaintiff Tennessee Fine Wines that Tennessee's residency requirements for the issuance of a retailer license are discriminatory on their face. *In Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), *cert. denied sub nom. Texas Package Stores Ass'n, Inc. v. Fine Wine & Spirits of N. Texas, LLC*, — U.S. ——, 137 S.Ct. 494, 196 L.Ed.2d 404 (2016), the Fifth Circuit denied relief from a permanent injunction entered in *Wilson v. McBeath*, No. CIV. A-90-CA-736, 1991 WL 540043, at *3 (W.D. Tex. June 13, 1991), *aff'd sub nom. Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), which prevented the enforcement of the Texas Alcoholic Beverage Code's residency requirement necessary to receiving a mixed beverage permit. In *Cooper v. McBeath*, the Fifth Circuit characterized the residency requirement as an "impenetrable barrier to entering the Texas liquor industry on substantially equal terms as Texans enjoy [which] discriminates against out-of-staters." 11 F.3d at 553.

This Court finds persuasive and adopts the reasoning of the Fifth Circuit in *Cooper v. Texas Alcoholic Beverage Comm'n*. In that case, the Fifth Circuit affirmed the reading of *Granholm* it adopted in *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010); that is, *Granholm* reaffirmed the Commerce Clause limits state alcohol regulations—to a greater extent when the regulations deal with the producer tier and to a lesser extent

when they deal with the retailer or wholesaler tier. *See Texas Alcoholic Beverage Comm'n*, 820 F.3d at 743. This Court agrees with the Fifth Circuit that "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." *Id.*

Although the *Granholm* Court stated that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent[,]" 544 U.S. at 489, 125 S.Ct. 1885, it is unnecessary to infer from that language that the Commerce Clause does not apply to all state regulations concerning the retailer and wholesaler tiers. This is because *Granholm* concerned a regulation that affected the producer-tier of the three-tier distribution system, so it makes sense that the *Granholm* Court discussed the protections of the Twenty-first Amendment in relation to liquor producers and products. Furthermore, *Granholm* affirmed Commerce Clause principles that apply to the treatment of people and things beyond liquor producers and products. *See Granholm*, 544 U.S. at 472, 125 S.Ct. 1885 (quoting *Oregon Waste*, 511 U.S. at 99, 114 S.Ct. 1345) ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.' ") (emphasis added). That *Granholm* affirmed the legitimacy of the three-tier system does not imply that a regulation, such as the retailer residency

requirements at issue, is immune from Commerce Clause challenge.[5]

---

[5] This Court disagrees with Defendant Association's argument that Plaintiff Tennessee Fine Wines "pay[s] no heed to the Court's established distinction between laws that discriminate against out-of-state producers and their products versus laws that regulate the liquor distribution system within the State after those products have arrived." (Docket No. 90 at 9). Defendant Association summarizes the Supreme Court's dormant Commerce Clause and Twenty-first Amendment jurisprudence, but none of it requires a different outcome than the one this Court reaches, especially when the *Granholm* majority discussed many of the cases Defendant Association points out and still concludes that the Commerce Clause's nondiscrimination principle limits state regulation of alcohol. Defendant Association casts doubt, by highlighting portions from the *Granholm* dissent, on what it calls "the [Granholm] majority's exception of producers from the effect of the Twenty-first amendment," which "exception," it argues, does not help Plaintiff Tennessee Fine Wines for reasons already discussed. (Docket No. 90 at 13). The *Granholm* dissent asserted that the *Granholm* majority conceded that schemes, such as private licensing schemes requiring in-state residency or physical presence, are "within the ambit of the Twenty-first Amendment." *Granholm*, 544 U.S. at 518, 125 S.Ct. 1885 (Thomas, J., dissenting). The dissent further stated that "allowing a State to require all wholesalers and retailers to be in-state companies is a core concern of the Twenty-first Amendment." *Id.* at 524, 125 S.Ct. 1885 (Thomas, J., dissenting). However, the *Granholm* dissent seems to have overstated what the majority conceded. Affirming that a state can require liquor to pass through an in-state wholesaler, as the *Granholm* majority did in dicta, is different from explicitly holding that the Twenty-first Amendment protects in-state durational residency requirements. Furthermore, as will be discussed, this Court finds there is a difference between an *in-state physical presence* requirement and a *durational residency* requirement, such as the residency requirements at issue here.

Granholm thus understood, this Court finds the residency requirements discriminatory on their face. The Court agrees that "[t]he Twenty-first Amendment does not ... authorize states to impose a durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers." *Texas Alcoholic Beverage Comm'n*, 820 F.3d at 743 (emphasis in original) (citing *Wine Country*, 612 F.3d at 821) (noting the difference between a permissible physical-residency requirement on retailers and wholesalers and an impermissible durational-residency requirement on the owners of retailers and wholesalers).[6] "Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system." *Id.* (citing *Wine Country*, 612 F.3d at 818). Although requiring liquor stores to be physically present in Tennessee may serve its interest in regulating alcohol, the Court fails to see how imposing a durational residency requirement serves the same. Therefore, the Court finds that durational-residency requirements, such as those at issue here, are not inherent to a legitimate three-tier system.

The two-year (for an initial retailer license) and ten-year (for a renewal retailer license) residency requirements applicable to both individuals and corporations are discriminatory because they discriminate against out-of-staters by creating a barrier to entering the Tennessee retail liquor

---

[6] This Court disagrees with Defendant Association's contention that these Fifth Circuit decisions "actually reveal inconsistency by the Fifth Circuit in attempting to follow *Granholm*." (Docket No. 90 at 16).

market. It is unavailing for Plaintiff Byrd to argue that the residency requirements apply even-handedly to every retailer seeking a license, whether in state or out, and that "applicants who are already Tennessee residents may not meet the two-year requirement along with their out-of-state counterparts." (Docket No. 73 at 10). Even though the latter may be factually true, that argument is unconvincing because it is still the case that a barrier is created for out-of-staters; pursuant to the residency requirements, nonresidents of Tennessee will always be unable to obtain a retail liquor license, but Tennessee residents of a certain duration may obtain one. Thus, the residency requirements "impermissibly favor Tennessee interests at the expense of interstate commerce." *Jelovsek*, 545 F.3d at 433; *see also Granholm*, 544 U.S. at 473, 125 S.Ct. 1885 (stating that laws violate Commerce Clause principles when "[t]hey deprive citizens of their right to have access to the markets of other States on equal terms").

Furthermore, Plaintiff Byrd's and Defendant Association's attempt to distinguish the Sixth Circuit's decision in *Jelovsek* from the facts of this case is not helpful to their position. Plaintiff Byrd and Defendant Association argue that the residency requirement found discriminatory in *Jelovsek* applied to wine producers, and, therefore, "discriminated against out-of-state wine producers in ways that gave Tennessee wineries a competitive advantage" and "implicated interstate commerce." (Docket No. 73 at 11; Docket No. 90 at 16). Plaintiff Byrd contends that, unlike the residency requirements in *Jelovsek*, the retailer residency requirements at issue do not

give in-state producers or products a competitive advantage. (Docket No. 73 at 11). Plaintiff Byrd argues that the residency requirements are protected by the three-tier system and "are firmly rooted in the regulation of who may be a retailer to sell products within Tennessee, regardless of whether the source of the liquor is in-state or out-of-state." (*Id.* at 12). He further contends that "[t]he residency requirement does nothing to inhibit the free flow of out-of-state liquor to those who meet the requirements of licensed wholesalers and retailers, who are free to sell both in-state and out-of-state liquor products directly to the general public." (*Id.* at 10–11).

It is clear that Plaintiff Byrd and Defendant Association base their arguments on a reading of *Granholm* that, per the discussion above, this Court rejects. Additionally, nothing in *Jelovsek* suggests that the Sixth Circuit interprets *Granholm* to mean that a statutory provision dealing with the retailer-tier is automatically protected from Commerce Clause challenge as long as it does not discriminate against out-of-state liquor producers or products. Even though the Sixth Circuit in *Jelovsek* states that "Tennessee's decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds[,]" 545 F.3d at 436 (citing *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885), it is not obvious that the Sixth Circuit would uphold a residency requirement affecting retailers on that basis.[7]

---

[7] Furthermore, the Sixth Circuit mentions Tennessee's three-tier distribution system in the context of affirming the district court's determination that Tennessee may ban entirely direct

Furthermore, the Court disagrees with Plaintiff Byrd that the residency requirement for a winery license found to be discriminatory in *Jelovsek* "made exceptions to Tennessee's three-tier system, much like the Michigan and New York statutes invalidated in *Granholm*[.]" (Docket No. 73 at 11). A court could appropriately characterize the statutory provisions invalidated in *Granholm* as exceptions to the three-tier distribution system because in-state wineries were allowed to ship directly to consumers, avoiding going through the wholesaler and retailer tiers, while out-of-state wineries could not do the same. The discriminatory winery residency requirement at issue in *Jelovsek* was not such an exception. Therefore, it is unavailing for Plaintiff Byrd to try to distinguish the retailer residency requirements at issue here from the discriminatory winery residency requirement at issue in *Jelovsek* on the basis that the former is not an impermissible exception from the three-tier system while the latter was.

B. **The residency requirements do not advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives**

Having found the retailer residency requirements discriminatory, the Court now considers whether they survive Plaintiff Tennessee Fine Wines' dormant Commerce Clause challenge because they "advance[ ] a legitimate local purpose that cannot be adequately

---

shipment of alcoholic beverages to consumers because the ban "applied equally to in-state and out-of-state wineries." *Jelovsek*, 545 F.3d at 436.

served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (citation omitted). "The burden is on the State to show that the ***discrimination*** is demonstrably justified." *Id.* at 492, 125 S.Ct. 1885 (internal quotation marks and citation omitted) (emphasis in original). This standard is exacting. *See id.* at 492–93, 125 S.Ct. 1885 ("The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.").

The General Assembly stated its purposes for enacting the residency requirements as follows:

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57–5–101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that

> the laws, rules and regulations governing such licensees are observed.

T.C.A. § 57–3–204(b)(4). Because Plaintiff Byrd argues that Tennessee's residency requirements are not subject to Commerce Clause challenge, he does not offer the Court any concrete evidence to show that the discrimination against out-of-state residents is demonstrably justified. Plaintiff Tennessee Fine Wines contends that the General Assembly's stated purposes do not suffice to save the residency requirements. This Court agrees.

Stating that "it is in the best interest of the health, safety, and welfare of [the] state" to impose retailer residency requirements does not prevent the residency requirements from violating the Commerce Clause. Tennessee's concern for its health, safety, and welfare is an appropriate reason for it to regulate alcohol in general and maintain a three-tiered distribution system. *See North Dakota v. United States*, 495 U.S. at 432, 110 S.Ct. 1986 ("The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders."); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 276, 104 S.Ct. 3049 (stating that a clear concern of the Twenty-first Amendment is to "combat the perceived evils of an unrestricted traffic in liquor"). However, that concern does not explain Tennessee's restriction on out-of-staters seeking a retail liquor license. Moreover, even if the retailer residency requirements advance the health, safety, and welfare of Tennessee,

there has been no attempt to show that nondiscriminatory means would fail to accomplish Tennessee's purposes. *See Anheuser–Busch, Inc. v. Schnorf*, 738 F.Supp.2d 793, 810–11 (N.D. Ill. 2010) ("Although Defendants have come forward with acceptable reasons why alcohol regulations in general and the three-tier system are valid . . . , none of those reasons justifies the discrimination . . . ").

Likewise, aiming "to maintain a higher degree of oversight, control, and accountability" of liquor retailers because products sold through them contain a high alcohol content does not stop the retailer residency requirements from running afoul of the Commerce Clause. The Supreme Court in *Granholm* rejected greater regulatory control as a sufficient justification when reasonable nondiscriminatory alternatives could serve that purpose. There, because the states provided little supporting evidence, the Supreme Court rejected the argument that the discriminatory statutes at issue aided them "to police underage drinking." *Granholm*, 544 U.S. at 490, 125 S.Ct. 1885 ("Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions."). Furthermore, the *Granholm* Court rejected the argument that allowing in-state producers, but forbidding out-of-state producers, to ship wine directly to consumers was justified because the states "ha[d] greater regulatory control over in-state producers than over out-of-state wineries." *Id.* The Court noted that alternative means existed. *See id.* at 490–91, 125 S.Ct. 1885 ("[T]he States can take less restrictive steps to

minimize the risk that minors will order wine by mail.").

Here, this Court fails to see how the retailer residency requirements even assist Tennessee to achieve a higher degree of oversight, control, and accountability over those involved in the ownership, management, and control of licensed retail premises. The Court has no evidence before it to allow it to infer that a prospective applicant for a retail package store license is subject to alcohol regulations during the two-year in-state residency period currently required for retailer license eligibility. Therefore, the Court cannot find that the retailer residency requirements help Tennessee to achieve greater oversight, control, and accountability. And as *Granholm* noted, "improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail." *Id.* at 492, 125 S.Ct. 1885. This applies equally to out-of-staters seeking a retail liquor license in Tennessee.

Because there has been no showing that the residency requirements advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, the Court finds that the residency requirements do not survive a Commerce Clause challenge.

II. Privileges and Immunities

Given that the Court disposes of this case on Commerce Clause grounds, the Court declines to rule on whether the residency requirements also violate

the Privileges and Immunities Clause of Art. IV, § 2 of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, Plaintiff Tennessee Fine Wines' Motion for Partial Summary Judgment, (Docket No. 55), will be granted. The Court declares the residency requirements unconstitutional under the dormant Commerce Clause and enjoins their enforcement.

An appropriate order shall be entered.

No. 18-96

In The Supreme Court of the United States

TENNESSEE WINE AND
SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TENNESSEE FINE WINES AND SPIRITS, LLC, DBA TOTAL WINE SPIRITS BEER & MORE

WILLIAM J. MURPHY
Counsel of Record
JOHN J. CONNOLLY
ALICIA SHELTON
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, MD 21202
(410) 332-0444
wmurphy@zuckerman.com

Counsel for Respondent Tennessee Fine Wines and Spirits, LLC dba Total Wine Spirits Beer & More

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RULE 29.6 STATEMENT

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More has no parent corporation, and no publicly held company owns any shares in Respondent.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	4
A. A Fair and More Complete Analysis of the Statutory Scheme	4
B. The Unusual Procedural Aspects of This Case	7
REASONS FOR DENYING THE PETITION	14
I. There Is No Real Conflict Among the Circuits	16
II. Petitioner Overstates the National Significance of This Case	21
III. The State of Tennessee Is Not the Petitioner Here And Has Not Seen Fit to Defend the Constitutionality of the Durational Residency Requirements in a Consistent Fashion	24
IV. Resolution of the Question Presented Will Not Finally Determine the Outcome of This Controversy	27
V. In Rejecting Petitioner's Strained Reading of *Granholm*, the Sixth Circuit Clearly Reached the Correct Result	29
CONCLUSION	34

TABLE OF CONTENTS—Continued

Page

APPENDIX

Tennessee Attorney General Opinion No. 12-59 (2012) 1a

Tennessee Attorney General Opinion No. 14-83 (2014) 13a

TABLE OF AUTHORITIES

Page

CASES

Anheuser-Busch, Inc. v. *Schnorf*, 738 F. Supp. 2d 793 (N.D. Ill. 2010) 23

Arnold's Wines, Inc. v. *Boyle*, 571 F.3d 185 (2d Cir. 2009) 20, 21

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984) 30

Brooks v. *Vassar*, 462 F.3d 341 (4th Cir. 2006) 20, 21

Brown-Forman Distillers Corp. v. *New York State Liquor Authority*, 476 U.S. 573 (1986) 16, 31

Cooper v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016) 17, 23, 27, 29

Diamond v. *Charles*, 476 U.S. 54 (1986) 26

Glazer's Wholesale Drug Co., Inc. v. *Kansas*, 145 F. Supp. 2d 1234 (D. Kan. 2001) 23

Granholm v. *Heald*, 544 U.S. 460 (2005) ..... *passim*

Halliburton Oil Well Cementing Co. v. *Reily*, 373 U.S. 64 (1963) 32

Healy v. *Beer Institute, Inc.*, 491 U.S. 324 (1989) 15, 31, 33

Hollingsworth v. *Perry*, 570 U.S. 693 (2013) 25, 26

Jelovsek v. *Bredesen*, 545 F.3d 431 (6th Cir. 2008) 6, 7

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) 32

North Dakota v. *United States*, 495 U.S. 423 (1990) 30

TABLE OF AUTHORITIES—Continued

Page

Oregon Waste Systems, Inc. v. *Department of Environmental Quality*, 511 U.S. 93 (1994) 31

Peoples Super Liquor Stores, Inc. v. *Jenkins*, 432 F. Supp. 2d 200 (D. Mass. 2006).....23

Southern Wine & Spirits of America, Inc. v. *Division of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013)..... 14, 17, 18, 19

Supreme Court of New Hampshire v. *Piper*, 470 U.S. 274 (1985) 28

Texas Package Stores Ass'n v. *Fine Wine & Spirits of North Texas, L.L.C.*, ___ U.S. ___ (2016) (Docket No. 16-242).....17, 27

Wilson v. *McBeath*, 1991 WL 540043 (W.D. Tex. 1991) 27

STATUTES

Ky. Rev. Stat. Ann. §243.100 22

La. Stat. Ann. §26:80 22

Me. Rev. Stat. tit. 28-A, §1401 22

Mo. Rev. Stat. §311.060.....22

N.H. Rev. Stat. Ann. §178:1 22

Tenn. Code Ann. §57-3-204(b)(2)(A) 4, 26

Tenn. Code Ann. §57-3-204(b)(3)(A) 5

Tenn. Code Ann. §57-3-204(b)(4) 6, 8, 12

Tenn. Code Ann. §57-3-213(a) 4

TABLE OF AUTHORITIES—Continued

Page

Tenn. Code Ann. §57-4-201 6

Wash. Rev. Code Ann. §66.24.010 22

Wis. Stat. Ann. §125.04 22

BRIEF IN OPPOSITION

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More ("Total Wine"), respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by the Tennessee Wine and Spirits Retailers Association ("Tennessee Retailers"). This case is not an appropriate vehicle to clarify whether *Granholm* v. *Heald*, 544 U.S. 460 (2005), carved out an exception to normal Dormant Commerce Clause principles that would allow States to enact blatantly discriminatory laws to protect local retailers from out-of-state competition, under the guise of regulating the sale of alcoholic beverages within the State.

The Tennessee statute at issue here flatly forbids citizens of other states from obtaining a license to operate a retail liquor store (a package goods store offering alcoholic beverages for off-premises consumption) unless they have established residency in Tennessee and continue to maintain it *for at least nine years*. The statute also prohibits corporations and other business entities from obtaining a retail liquor license unless *every director, officer and shareholder of the business* has been a Tennessee resident for at least nine years. If this statute had been upheld, Total Wine, whose owners reside in Maryland, would have been ineligible for a retail liquor license. The statute would also render ineligible for a retail license any publicly traded corporation and many other larger out-of-state businesses. The Attorney General of Tennessee twice opined that this residency statute violated the Dormant Commerce Clause and could not be enforced.

See Opp. App. at 1a-18a. Thereafter, out-of-state residents, including two of the named respondents, began to apply for and obtain liquor licenses in Tennessee. When the Tennessee Retailers threatened to sue the State's Alcoholic Beverage Commission ("Commission") if Total Wine were granted a retail license, the Attorney General filed this declaratory judgment action in a Tennessee chancery court to determine if the statute was in fact unenforceable. After removal of the case to the United States District Court for the Middle District of Tennessee (upon petition of the Tennessee Retailers), Judge Sharp concluded—in a thorough opinion—that the statute blatantly discriminated against out-of-state residents, while noting that neither the Commission, nor the Tennessee Retailers, had offered any evidence of a legitimate non-protectionist purpose advanced by the residency requirements. *See* Pet. App. at 78a-80a.

The Court of Appeals affirmed the District Court's ruling in another thorough opinion. Pet. App. 2a-39a. Even dissenting Judge Sutton (who concurred in portions of the majority opinion) determined that certain aspects of the statute did not further any legitimate state interest, *id.* at 54a, while other aspects constituted "the epitome of arbitrariness." *Id.* at 55a. It is little wonder that the State of Tennessee, through its Attorney General and the Director of the Commission, *did not appeal* the ruling of the District Court declaring the statute unconstitutional and enjoining its enforcement, and declined to participate in oral argument in the Sixth Circuit. Moreover, the State never

sought a stay of enforcement of the District Court's injunction, and the Commission has now granted liquor licenses to both respondents. Both of these "out-of-state" licensees are currently operating retail liquor stores in Tennessee.[1]

As set forth below, this case is a far cry from the "clean vehicle" posited by the Tennessee Retailers for this Court to provide guidance on the proper application of *Granholm* to state durational residency requirements for obtaining licenses for the wholesale and retail sale of alcohol. In addition, Judge Moore, who authored the Court of Appeals' majority opinion, clearly got it right. The bizarre durational residency requirements enacted by Tennessee are blatantly protectionist, have no legitimate regulatory purpose, and cannot be squared with decades of this Court's Commerce Clause jurisprudence, including the Court's decision in *Granholm*.

---

[1] Respondent Total Wine opened its 30,000 square foot store in Knoxville on June 27, 2018. It is the largest retail establishment of its kind in the State and it offers the widest selection of beers, wines, and spirits, at competitive prices not previously seen in Tennessee. *See* https://www.knoxnews.com/story/money/business/2018/06/28/total-wine-party-new-turkey-creek-store/741997002/. All of the store's employees, including its general manager, are Tennessee residents. Respondent Affluere Investments, Inc. ("Affluere") acquired an existing liquor store in Memphis, Tennessee in the summer of 2017. Affluere's stockholders, directors, and executive officers are now and have been residents of the State of Tennessee since June, 2016.

STATEMENT OF THE CASE

A. A Fair and More Complete Analysis of the Statutory Scheme.

The Tennessee Retailers focus their Petition only on certain aspects of the durational residency statute in question, without acknowledging how the statute was designed to prevent any out-of-state residents or any business with out-of-state owners from obtaining a liquor license in Tennessee. For example, Petitioner notes that "Tennessee law provides that, to obtain a retail license, an individual must have 'been a bona fide resident of Tennessee during the two year period immediately preceding the date upon which application is made.'" Pet. at 8 (quoting Tenn. Code Ann. §57-3-204(b)(2)(A)). But Petitioner all but ignores the very next clause, which provides that a retail liquor license, once granted, cannot be renewed unless the applicant has been a Tennessee resident "for at least ten (10) consecutive years." Tenn. Code Ann. §57-3-204(b)(2)(A). Given that liquor licenses in Tennessee are only valid for one year after issuance, Tenn. Code Ann. §57-3-213(a), the renewal requirement effectively imposes a *nine year* durational residency requirement on individuals seeking to own and operate a Tennessee package store. As a practical matter, no person who had resided in Tennessee for less than nine years would spend the funds necessary to obtain a license, and build and stock a liquor store, in the face of these license renewal requirements. It was this aspect of the statute that Judge Sutton (whose separate opinion is otherwise touted by Petitioner as having adopted the correct deferential

approach) described as "the epitome of arbitrariness." Pet. App. at 55a.

Petitioner glosses over another aspect of the statute that Judge Sutton and the Court of Appeals' majority agreed was in plain violation of the Dormant Commerce Clause. For business entities, including Tennessee limited liability companies like Total Wine, no license can be granted or renewed "if any officer, director, or stockholder owning any capital stock in the corporation, would be ineligible" under the nine year durational residency requirements for individual licensees. *See* Tenn. Code Ann. §57-3-204(b)(3)(A). Thus, no corporate entity can obtain a Tennessee liquor license unless *every* officer, *every* director, and *every* shareholder can establish Tennessee residency for nine years prior to the date of application. The effective and intended result of this provision is to preclude outside business interests, including large specialty stores like Total Wine, from obtaining a Tennessee liquor license and competing with the Tennessee Retailers. Judge Sutton noted that he saw "no way to explain this all-or-nothing-at-all stockholder requirement as doing anything other than promoting economic protectionism." Pet. App. at 54a. And the majority opinion correctly observed in response to Judge Sutton's attempt to sever and uphold only certain clauses of the residency statute that the State had offered no evidence during the District Court proceedings to prove (or even suggest) that any aspect of Tennessee's durational residency requirements actually served a purpose other than economic protectionism. *Id.* at 37a-38a & n.11.

Finally, Petitioner ignores certain other incongruous aspects of the Tennessee statute. For example, the durational residency requirements for retail licensees were initially enacted in 1984, *see* Opp. App. at 9a, but the legislative statement of intent with respect to those provisions was not enacted until 2014, only after the State's Attorney General had opined that the requirements could not be enforced under the Commerce Clause as interpreted by the Court of Appeals' opinion in *Jelovsek* v. *Bredesen*, 545 F.3d 431 (6th Cir. 2008) (discussed below). *See* Opp. App. at 14a-16a. And while the Tennessee legislature belatedly attempted to justify the durational residency requirements on a need to maintain a "higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises," Tenn. Code Ann. §57-3-204(b)(4), those requirements never have been applied to retail licensees who sell spirits, wine and beer for on-premises consumption in bars and restaurants. *See* Tenn. Code Ann. §57-4-201. Petitioner argues that these requirements are deserving of deference because they serve important community interests tied to the local consequences of excessive alcohol consumption, such as drunk driving, thereby warranting that local retailers should be fully invested in those communities. Pet. at 31. Yet there is no explanation for the fact that Tennessee has never required that all (or any) of the owners, officers and directors of national hotel and restaurant chains should be required to establish residency in Tennessee before they obtain retail licenses to serve alcohol for on-premises consumption. The durational

residency requirements at issue here were enacted in 1984 to protect established local package stores against competition from out-of-state businesses seeking to enter the Tennessee market.

B. The Unusual Procedural Aspects of This Case.

Petitioner begins its discussion of the procedural history of this case in 2016, when Total Wine and respondent Affluere Investments, Inc. applied for Tennessee retail liquor licenses. Pet. at 9. Petitioner omits prior events showing why the applicants reasonably expected to receive a license notwithstanding the durational residency requirements imposed by the statute. Eight years earlier, in *Jelovsek* v. *Bredesen*, *supra*, the Court of Appeals held that nearly identical durational residency requirements for the issuance of a Tennessee winery license were discriminatory on their face and impermissibly favored the interests of Tennessee wineries "at the expense of interstate commerce." 545 F.3d at 438.

After the decision in *Jelovsek*, and upon request of a member of the state legislature, the Attorney General of Tennessee opined in 2012 that the Tennessee residency requirements for applicants seeking a license as an alcoholic beverage retailer or wholesaler also violated the Commerce Clause and could not be enforced. Among other reasons, the Attorney General examined the legislative history of the statutes and determined that it "reveals no legitimate public policy to

support these residency requirements and indeed provides some evidence that the legislative intent for the residency requirements for retailers was to deter the sale of alcoholic beverages from outside Tennessee, which intent would violate the federal Commerce Clause." Opp. App. at 11a.[2] Undeterred, the lobbyists for the Tennessee Retailers returned to the legislature seeking relief.

In 2014, the Tennessee General Assembly amended the licensing statute and removed the residency requirements for certain classes of retail licensees, but retained the durational residency requirements for retail licensees seeking to sell spirits and high alcohol content beer for off-premises consumption. At the same time, the General Assembly, without any legislative fact-finding, enacted a new statement of purpose in Tenn. Code Ann. §57-3-204(b)(4). New subsection (b)(4) stated that it was in the interest of the state "to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises" selling products containing higher alcohol content than persons seeking licenses to sell only wine and beer, who were not subjected to the residency requirements. According to the General Assembly, that state interest could only be satisfied if Tennessee required "all licensees to be residents of this state as provided

---

[2] For example, the Attorney General pointed to floor debates in which a member of the Tennessee House noted that they had just voted "to kill interstate banking. I think all this does is kill interstate whiskey." Opp. App. at 9a.

herein. . . ." The General Assembly offered no other reasons supporting the two-year and ten-year durational residency requirements for an initial application and license renewal, nor any reason why the asserted local interests in ensuring responsible sales of spirits could not be satisfied, for example, by a requirement that a corporate licensee designate a resident manager or agent, post a bond to ensure compliance with all local laws, and/or file regular compliance reports with the Commission. Nor did the General Assembly explain why its concerns for local accountability did not apply to the owners of bars and restaurants.

The Attorney General of Tennessee was asked again, this time by a state senator, whether the amended statute violated the Commerce Clause. Relying principally on this Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), the Attorney General readily concluded in 2014 that the residency requirements facially discriminated against nonresidents, and that the statement of legislative intent in subsection (b)(4) did not establish a local purpose sufficient to justify the discriminatory licensing provisions. Opp. App. at 13a. The Attorney General reasoned that the State had not carried its burden of showing that its need for "greater oversight with alcohol-related licenses can be served only by favoring residents over nonresidents." *Id.* at 16a. The Attorney General also observed that the State's asserted interests in ensuring the "health, safety, and welfare" of local communities could readily be achieved by less discriminatory means, including

various forms of electronic monitoring. *Id.* at 17a-18a (citing *Granholm*, 544 U.S. at 492-93).

After the Attorney General's second opinion, the Commission continued to accept retail license applications from out-of-state residents, and from businesses that did not meet the requirement that all officers, directors, and shareholders needed to establish and maintain residency in Tennessee. Total Wine was formed as a Tennessee limited liability company in November, 2015 and on July 5, 2016, applied for a license for a new package store to be located in Nashville. Pet. App. 58a. The members of Total Wine are not Tennessee residents, *id.*, but in its application Total Wine designated a general manager who planned to relocate and become a resident of Tennessee. And, of course, all of the store's prospective employees would be Tennessee residents. The staff of the Commission recommended that the license be approved and the Commission was scheduled to vote on the application on August 23, 2016. Another application from respondent Affluere (whose owners recently had moved to Tennessee but who did not meet the two-year and ten-year durational residency requirements) was also scheduled to be voted on at that meeting. The Commission, however, postponed and later deferred action on the scheduled vote on the respondents' applications pending the outcome of this action. On September 21, 2016, Respondent Clayton Byrd, the Executive Director of the Commission, represented by the State's Attorney General (a successor to the Attorney General who had twice opined that the residency requirements violated

the Commerce Clause) filed a declaratory judgment action in the Chancery Court for Davidson County, Tennessee seeking a ruling on the constitutionality of the durational residency provisions as applied to applicants for off-premises retail liquor licenses. Pet. App. at 4a.

Total Wine, Affluere, and the Tennessee Retailers (who had threatened to sue the Commission if Total Wine were granted a license) were named as defendants in the Chancery Court action. The Tennessee Retailers removed the action to the District Court on federal question grounds, and Judge Sharp entered an order realigning Total Wine and Affluere as plaintiffs (along with Respondent Byrd), leaving the Tennessee Retailers as the sole defendant. *Id.* at 4a n.1. But when Total Wine moved for summary judgment with respect to the constitutionality of the residency requirements, the State and the Tennessee Retailers each filed opposition memoranda supporting the statute's constitutionality. *Id.*

In granting Total Wine's motion, the District Court readily found that the statutory provisions discriminated against interstate commerce because they created a barrier to entry, precluding out-of-state residents and business owners from seeking to enter the Tennessee retail liquor market. Pet. App. at 73a-74a. The Court also concluded that the residency requirements did not advance a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory means. *Id.* at 76a-77a. The Court noted that Respondent Byrd had not offered "any concrete

evidence to show that the discrimination against out-of-state residents is demonstrably justified," relying instead on an argument that Tennessee's residency requirements were not subject to a Commerce Clause challenge at all because of the State's grant of regulatory control over the retail sale and distribution of alcoholic beverages under the Twenty-first Amendment. *Id.* at 78a. After reviewing the statement of legislative purpose in §204(b)(4) of the statute, the District Court concluded that it "fails to see how the retailer residency requirements even assist Tennessee to achieve a higher degree of oversight, control, and accountability over those involved in the ownership, management, and control of licensed retail premises." *Id.* at 80a. Because the State and the Tennessee Retailers had made "no showing that the residency requirements advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, the Court finds that the residency requirements do not survive a Commerce Clause challenge." *Id.*[3] The District Court declared the residency requirements unconstitutional and enjoined their enforcement. *Id.* at 81a.

---

[3] The District Court's ruling on Commerce Clause grounds precluded the need for the Court to rule on Total Wine's alternative argument that the Tennessee residency statutes also violated the rights of Total Wine's owners under the Privileges and Immunities Clause of the Constitution. Although the Privileges and Immunities claim was briefed below, the Court of Appeals also did not rule on that issue. As addressed herein, this is one of several reasons why this case is not an appropriate vehicle for the Court to resolve the question that Petitioner seeks to present.

Petitioner Tennessee Retailers filed a timely notice of appeal from the District Court's judgment; the Attorney General, representing Respondent Byrd and the interests of the State, did not. The Attorney General did file a brief in the Court of Appeals generally supporting the statute, but the State waived oral argument. Significantly, neither the Tennessee Retailers nor the State ever sought a stay of enforcement of the District Court's order enjoining Respondent Byrd from applying the residency requirements. As a result, by the time this case was argued in the Court of Appeals, Affluere already had obtained its liquor license. Total Wine lost its opportunity to obtain a license in Nashville when it was unable to execute the lease on its desired premises due to the pendency of this litigation. But after the Court of Appeals issued its ruling, Total Wine applied for and obtained a retail license for a new package store in Knoxville. That 30,000 square foot store opened for business on June 27, 2018. *See* note 1 *supra*.

Total Wine believes there are several other retail stores licensed by the Commission and currently open for business in Tennessee that do not satisfy the durational residency requirements at issue in this litigation.[4] Those licenses were granted by the

---

[4] During the proceedings in the District Court, Total Wine sought discovery from the State through a public information request about the existence of other Tennessee retailers who do not meet the residency requirements imposed by the statute. The Commission responded that it did not keep track of the residency of applicants for retail licenses once the Attorney General had declared the statute unenforceable. *See* R.96 (Page ID#611-18)

Commission following the opinions of the Attorney General described above, and before Respondent Byrd filed this declaratory judgment action based on the threat of litigation from the Tennessee Retailers.

REASONS FOR DENYING THE PETITION

The opinions of the District Court and the Court of Appeals majority demonstrate thoroughly that the essential premises of the Petition are flat wrong. First, contrary to language in the opinion of the Court of Appeals in *Southern Wine & Spirits of America, Inc.* v. *Division of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), and the separate opinion of Judge Sutton in this case (dissenting with respect to certain aspects of the Tennessee durational residency requirements), this Court's decision in *Granholm* did not grant the States *carte blanche* to enact and enforce anticompetitive legislation that would shield local liquor wholesalers and retailers against competition from out-of-state businesses that sought to establish locations in those States. Second, no decision from this Court is needed to resolve a conflict among the Circuits because no reviewing court would conclude that the Tennessee statute at issue here serves any purpose

---

(declaration of counsel and attached letter from Commission confirming that after the 2012 Attorney General's opinion the Commission did not consider the Tennessee residency requirements in acting upon applications for retail licenses nor maintain records concerning out-of-state residents who had obtained licenses).

other than an impermissible purpose to protect local businesses from out-of-state competition.

As the Court of Appeals majority correctly concluded, *Granholm* in fact makes clear that the nondiscrimination principle of the Commerce Clause applies to *all* aspects of the sale and distribution of alcoholic beverages, and is not limited, as Petitioner contends, to discrimination against out-of-state products. *See* Pet. App. at 16a-23a. And even though the "three tier system" of alcohol distribution imposed by most States has been held to be "unquestionably legitimate," *Granholm*, 544 U.S. at 489, that does not mean those States are free to structure their three tier systems solely to protect local business interests, and to discriminate against nonresidents seeking to compete within the State through the imposition of onerous durational residency requirements that serve no legitimate purpose. As Justice Scalia observed in a concurring opinion in *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 344 (1989), when a State exercises its regulatory power over the sale of alcoholic beverages in a fashion that discriminates against out-of-state interests, "[t]he discriminatory character [of the challenged statute] eliminates the immunity afforded [to the State] by the Twenty-first Amendment." The Court in *Granholm* quoted Justice Scalia's observation with approval, 544 U.S. at 488. (In an otherwise thorough collection of relevant precedents, Petitioner fails to mention *Healy*.)

In *Granholm*, this Court also reaffirmed throughout its opinion that the Commerce Clause does not simply prohibit protectionist discrimination against

out-of-state products and producers, but rather prevents the States from depriving "citizens of their right to have access to the markets of other States on equal terms." *Id.* at 473. In fact, the *Granholm* Court reiterated that "'[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.'" *Id.* at 487 (quoting *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

Total Wine's owners are residents of Maryland, who formed a Tennessee limited liability company with the purpose of gaining access to the retail market for the off-premises sale of alcoholic beverages in that State on equal terms with residents of Tennessee. In purporting to deny Total Wine a liquor license on the sole basis that its owners are not residents of Tennessee, the State's durational residency statute favors in-state economic interests over out-of-state interests, and the courts below were correct to strike it down.

But aside from the fact that this case was correctly decided below, there are ample additional reasons for this Court to deny the Petition.

I. There Is No Real Conflict Among the Circuits.

No federal appellate court has reviewed a durational residency requirement for a liquor license that is at all similar to the Tennessee statute at issue here

and determined that, despite its discriminatory effect on nonresidents, it was immunized from Commerce Clause scrutiny by the Twenty-first Amendment or validated by legitimate state purposes that could not otherwise be adequately served. That is because no state has enacted residency requirements for wholesale and retail liquor licenses that are as blatantly discriminatory as the Tennessee provisions at issue here. Indeed, Judge Sutton in his separate opinion recognized that the requirement that a corporation could not be approved for a retail license unless 100% of its shareholders were Tennessee residents could not be explained as based on anything other than the promotion of unlawful economic protectionism of the sort that the Commerce Clause was designed to prevent. Pet. App. at 54a. And the requirement that no license can be renewed unless the license holder and all of its principals have maintained Tennessee residences for ten consecutive years was acknowledged by Judge Sutton to represent "the epitome of arbitrariness." *Id.* at 55a.

Petitioner argues that the decision below, and multiple decisions of the Court of Appeals for the Fifth Circuit, culminating in *Cooper* v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), *cert. denied sub nom. Texas Package Stores Ass'n* v. *Fine Wine & Spirits of North Texas, L.L.C.*, ___ U.S. ___ (2016) (Docket No. 16-242), are in irreconcilable conflict with the decision of the Eighth Circuit in *Southern Wine & Spirits, supra*. But the decision in *Southern Wine* is distinguishable both factually and doctrinally. In that case, the Court of Appeals upheld a Missouri statute

that imposed a three year residency requirement for corporations seeking to obtain a wholesaler's license in that State. Missouri defended the statute, which applied to the corporation's officers, directors, and at least 60% of its shareholders, based on the State's asserted interest in public accountability. The Court found that the discrimination against nonresident corporations inherent in these requirements would be impermissible under the Commerce Clause, unless authorized by the Twenty-first Amendment. 731 F.3d at 807. But notably, the Court also observed that Southern Wine had waived in the district court any argument that the legislation was motivated *solely* by economic protectionism—implying that if that were the statute's only purpose the residency requirements would be invalid, even if they were integral to Missouri's three-tier system of alcohol distribution. *Id.* at 807-08. Finally, the Court interpreted language in *Granholm*, and specifically the sentence reaffirming that "the three-tier system itself is 'unquestionably legitimate,'" 544 U.S. at 489, as mandating some deference for the states in structuring the wholesale and retail tiers, so long as they did not discriminate against out-of-state producers of beer, wine, and spirits. Based on that reasoning, the Court determined that Missouri had "established a sufficient basis for its residency requirement, which is meaningfully tied to the 'aim of the Twenty-first Amendment . . . to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.'" 731 F.3d at 812 (quoting *Granholm*, 544 U.S. at 484).

The decision of the Eighth Circuit in *Southern Wine* clearly turned on the Court's acceptance of the State's proffered nondiscriminatory purposes for its wholesaler residency requirements, and the plaintiff's failure to demonstrate that the sole purpose of the Missouri statute was protectionist. Here, by contrast, both the District Court and the Court of Appeals determined that the Tennessee durational residency requirements were blatantly discriminatory and protectionist, both in purpose and effect. And the Sixth Circuit majority found, based on the record presented in the District Court, that "neither [Respondent] Byrd nor [Petitioner] argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's [stated] goals." Pet. App. at 33a. For these reasons, it is not at all clear that this case would have turned out differently if it had been decided in the Eighth Circuit.

Moreover, it is perfectly clear that the decisions of the Courts of Appeals for the Second and Fourth Circuits, relied upon by Petitioner as evidence that the Circuits are "intractably divided," Pet. at 23, are not in conflict with the decision below. As Petitioner concedes, *id.*, those decisions did not involve durational residency requirements for the owners of local liquor licenses. The Second and Fourth Circuit decisions both involved challenges to laws that required alcohol to be sold to local consumers by in-state licensed retailers who had established a physical presence in the state consistent with the three-tier system created by those states. Total Wine today is selling alcohol in Tennessee

from its retail package store in Knoxville as a licensed in-state retailer.

In *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185 (2d Cir. 2009), an Indiana retailer sought the ability to sell directly to New York consumers without first obtaining a New York retail license or opening a local store. The requirement that any retailer had to obtain a license, and establish a physical presence in the state, was inherent in New York's three-tier system of licensed distribution of alcoholic beverages. The Second Circuit's observation that the plaintiff's Commerce Clause challenge presented "a frontal attack on the constitutionality of the three-tier system itself," 571 F.3d at 190, and was thereby inconsistent with *Granholm*, was made in that narrow context.

In *Brooks* v. *Vassar*, 462 F.3d 341 (4th Cir. 2006), the Court reviewed a number of Commerce Clause challenges to Virginia's liquor laws. The plaintiffs argued, among other claims, that a Virginia statute that allowed consumers to bring into the State for consumption only limited amounts of wine purchased from out-of-state wineries impermissibly favored in-state licensed retailers who could sell unlimited amounts of wine to those same consumers. *Id.* at 352. It was in this context that Judge Niemeyer, speaking only for himself,[5] observed that "an argument that

---

[5] The aspect of *Brooks* relied upon by Petitioner to support the asserted conflict was not contained in an opinion for the Court. District Judge Goodwin dissented and would have affirmed the District Court's conclusion in *Brooks* that Virginia's so-called "Personal Import Exception" violated the Commerce

compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." Judge Niemeyer opined that any such argument was precluded by *Granholm*. *Id.*

Neither the Second Circuit's holding in *Arnold's Wines*, nor Judge Niemeyer's opinion in *Brooks*, has anything to do with the constitutionality of durational residency requirements that prevent otherwise qualified nonresidents from becoming in-state licensees. These decisions do not demonstrate a conflict in the Circuits on the question presented by this Petition. Moreover, as will be shown below, protectionist residency requirements have in fact been disfavored by a long line of federal decisions, following this Court's Commerce Clause precedents, including the decision in *Granholm*.

II. Petitioner Overstates the National Significance of This Case.

Petitioner contends that as many as 21 states impose some form of durational residency requirements on alcohol retailers or wholesalers, and that many more state laws impose other residency-related

---

Clause. *See* 462 F.3d at 361-63. Judge Traxler concurred in the Court's opinion, except for the portion relied upon by Petitioner, as to which he concurred in the judgment without further explanation. *Id.* at 361.

restrictions on the distribution and sale of alcohol. Pet. at 23-25 & n.3 (collecting statutory citations). Affiliates of Total Wine are currently operating licensed retail package stores in several of those states, including Kentucky, Missouri, New York, South Carolina, Virginia, and Washington, despite the fact that the owners of those licensees do not reside in the states in question.[6] Many "three-tier system" states impose no residency requirements on wholesale or retail licensees. In other states, national retailers are able to obtain licenses because many of the statutes cited by Petitioner allow corporations and other business entities to establish and maintain "resident status" if they are registered or qualified to do business in the state, *e.g.*, Ky. Rev. Stat. Ann. §243.100; La. Stat. Ann. §26:80; Me. Rev. Stat. tit. 28-A, §1401; Wash. Rev. Code Ann. §66.24.010, or they have designated a local manager or single officer or director who becomes the resident agent of the licensee, *e.g.*, Mo. Rev. Stat. §311.060; N.H. Rev. Stat. Ann. §178:1 (applicable solely to manufacturers and distributors); Wis. Stat. Ann. §125.04. These

---

[6] Total Wine currently has licensed stores in 23 states that permit private retail sales of alcoholic beverages. The local licensees are typically organized as corporations or limited liability companies. The principal owners of these licensees reside in only one of those states, Maryland. All of the states in which Total Wine does business have implemented some form of the three-tier system for the distribution of alcoholic beverages. Many do not require that a locally registered corporate or business licensee establish some other form of state "residence." Many others, by statute, regulation, or administrative practice, allow entity licensees to designate a local manager as their resident agents for regulatory purposes.

statutes offer clear proof that a durational residency requirement for all officers, directors, and shareholders of a corporate licensee is not an essential element of the three-tier system of distribution. And none of the statutes cited by Petitioner imposes an effective nine year durational residency requirement on applicants for wholesale or retail licenses. The Court of Appeals majority correctly found that the Tennessee statute is blatantly protectionist and serves no legitimate local purpose that could not be readily served by other non-discriminatory licensing requirements. *See* Pet. App. at 32a-33a (describing such alternatives).

In several other states, restrictive residency requirements (including some of those cited by the Petitioner) have been struck down by reviewing courts as inconsistent with the Dormant Commerce Clause, notwithstanding the same Twenty-first Amendment arguments presented by Petitioner here. *See, e.g.*, *Cooper* v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), discussed *supra* (Texas durational residency requirements are invalid under *Granholm*); *Anheuser-Busch, Inc.* v. *Schnorf*, 738 F. Supp. 2d 793 (N.D. Ill. 2010) (Illinois statutes denying distribution rights to out-of-state breweries are invalid under *Granholm*); *Peoples Super Liquor Stores, Inc.* v. *Jenkins*, 432 F. Supp. 2d 200, 221 (D. Mass. 2006) (opining in a challenge to Massachusetts residency requirements that "*Granholm* cannot be held to sanction protectionist policies at any of the [three] tiers"); *Glazer's Wholesale Drug Co., Inc.* v. *Kansas*, 145 F. Supp. 2d 1234, 1246 (D. Kan. 2001) (discriminatory durational residency

requirements have "nothing to do with" a state's interest in ensuring regulatory compliance).

Like the Court of Appeals in this case, those courts had little difficulty in reconciling *Granholm*'s reaffirmation of the essential nondiscrimination principles of the Dormant Commerce Clause with the "unquestioned legitimacy" of the three-tier system of alcohol distribution. Those decisions also belie any "intractable conflict" about the meaning of *Granholm*.

III. The State of Tennessee Is Not the Petitioner Here And Has Not Seen Fit to Defend the Constitutionality of the Durational Residency Requirements in a Consistent Fashion.

Respondent Byrd did not appeal the judgment of the District Court, and the Attorney General waived the State's opportunity to present oral argument in the Court of Appeals in support of the constitutionality of the durational residency requirements. Last week, the Attorney General waived a response to this Petition on behalf of Respondent Byrd. Throughout the course of these proceedings, the Attorney General of the State has vacillated over the validity of the durational residency requirements, opining twice in formal opinions that the legislation was invalid under the Commerce Clause. *See* Opp. App. at 1a-18a. When a successor Attorney General initiated the declaratory judgment action that began this litigation, the State's position on the validity of the statute was so unclear that, following removal of the Chancery Court complaint, the

District Court aligned Respondent Byrd as among the plaintiffs challenging the statute. *See* Pet. App. at 4a n.1. And although the Attorney General filed briefs in the courts below defending the statute, Respondent Byrd never offered evidence to suggest, let alone demonstrate, that any aspect of Tennessee's durational residency requirements actually served a purpose other than economic protectionism. *See* Pet. App. at 76a-80a (District Court findings); 32a-33a (decision of the Court of Appeals).

This Court should decline Petitioner's invitation to rewrite decades of Commerce Clause and Twenty-first Amendment jurisprudence where the authorized officials of the State have not defended the statute at issue in a consistent fashion nor offered a coherent rationale for why the statute can be justified despite its discriminatory effect on nonresidents. The Petition here is presented by the Tennessee Retailers, a private trade association and lobbying organization whose members are motivated by their own business interests in preserving a local enclave free from competition from nonresidents like the owners of Total Wine, who have extensive experience operating efficient retail stores. The Tennessee Retailers no doubt lobbied for the challenged legislation, but they do not speak for the State of Tennessee.

Under somewhat similar circumstances, in *Hollingsworth* v. *Perry*, 570 U.S. 693, 715 (2013), this Court observed: "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to.

We decline to do so for the first time here." In this case, the Attorney General of Tennessee twice opined that the statute was unconstitutional, in reliance upon this Court's decision in *Granholm*, and Respondent Byrd only initiated this litigation when threatened with a lawsuit from Petitioner. And after the District Court enjoined continuing enforcement of the statutes in question, the relevant state officials did not seek a stay. Instead, once the District Court ruled, and even before the Court of Appeals affirmed that decision, Respondent Byrd and the Commission began to accept applications and issue licenses to nonresident parties such as Total Wine and Affluere, so long as they satisfied all the reasonable requirements imposed by the State for the grant of a retail liquor license. Those nonresidents who have obtained licenses have now opened for business at considerable expense and they expect to have the ability to renew those licenses without regard to the ten year residency requirement imposed by Tenn. Code Ann. §57-3-204(b)(2)(A).

The principles underlying the decision in *Hollingsworth* are applicable here. This Court has previously noted that "the power to create and enforce a legal code . . . is one of the quintessential functions of a State. Because the State alone is entitled to create a legal code, only the State has . . . [a] direct stake . . . in defending the standards embodied in that code." *Diamond* v. *Charles*, 476 U.S. 54, 65 (1986) (internal citations omitted). Given Respondent Byrd's waiver of the opportunity to respond to the Petition, it cannot be gainsaid that the Attorney General's defense of the statute in question has been inconsistent, ambivalent,

and at most lukewarm. This Court should reserve its grant of plenary review to a case in which the legitimacy of durational residency requirements for obtaining a state liquor license has been defended vigorously by the authorized proponents of the challenged legislation.[7]

IV. Resolution of the Question Presented Will Not Finally Determine the Outcome of This Controversy.

As noted above, Total Wine moved in the District Court for a ruling that the Tennessee durational residency requirements violated both the Dormant Commerce Clause and the Privileges and Immunities Clause of Article IV of the Constitution. *See, e.g.*, *Wilson* v. *McBeath*, 1991 WL 540043 (W.D. Tex. 1991) (enjoining enforcement of the Texas durational residency

---

[7] Two years ago this Court was presented with a similar challenge to a decision of the Court of Appeals for the Fifth Circuit rejecting efforts by the Texas Package Stores Association to overturn a longstanding injunction against the enforcement of a durational residency requirement for the issuance of retail liquor licenses in Texas. As in this case, the Texas retailers' association argued that the decision in *Granholm* authorized the otherwise discriminatory statute. The State of Texas—the party that had been enjoined in 1991 from enforcing the discriminatory statute—remained on the sidelines and took no role in the Texas retailers' efforts to undo the ongoing effect of the injunction, and revive the durational residency requirement. This Court denied the petition for certiorari. *See Cooper* v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), *cert. denied sub nom. Texas Package Stores Ass'n* v. *Fine Wine & Spirits of North Texas, L.L.C.*, ___U.S. ___ (2016) (Docket No. 16-242).

requirements for obtaining a retail mixed beverage permit because they violated both the Commerce Clause and the Privileges and Immunities Clause). The District Court declined to reach the issue, Pet. App. at 80a-81a, and the Court of Appeals did not address it.

But Total Wine did brief this issue in the Court of Appeals, contending that the durational residency requirements deprived the individual owners of Total Wine of any opportunity to engage in a lawful business in Tennessee "on terms of substantial equality with the citizens of that State," a right that this Court has held to be protected by the Privileges and Immunities Clause. *See Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 280 (1985) (holding that a state's court rules limiting bar admission to state residents violated Privileges and Immunities because such clear discrimination against nonresident lawyers was not substantially related to legitimate state purposes that could not be adequately served by less restrictive means).

Petitioner argued below that the Privileges and Immunities Clause does not apply to corporations and should not be held applicable to the State's exercise of its police powers over liquor licenses. Those arguments were not well-founded for at least three reasons: 1) Total Wine was named as a defendant in this declaratory judgment action but was effectively asserting the individual rights of its owners who were deprived of the opportunity to obtain a license for their company based solely on the fact that they were not Tennessee residents; 2) this Court has never ruled that the Privileges

and Immunities Clause does not apply to members of limited liability companies; and 3) there has never been a decision from this Court holding that the Privileges and Immunities Clause is overridden by the Twenty-first Amendment, and nothing in *Granholm* suggests that state regulation of the liquor business is immune from scrutiny under Article IV, §2 of the Constitution.

In the unlikely event that this Court were to grant this Petition and reverse the decision of the Court of Appeals, a remand would be required in order for the courts below to address the Privileges and Immunities arguments implicated by Respondent Byrd's declaratory judgment action, and Total Wine's claim that the durational residency requirements violate the "privileges and immunities" of nonresidents who are deprived of the opportunity to apply for a retail liquor license on equal footing with citizens of Tennessee.

V. In Rejecting Petitioner's Strained Reading of *Granholm*, the Sixth Circuit Clearly Reached the Correct Result.

The linchpin of the position advanced by the Tennessee Retailers in this case, like the position of the Texas Package Stores Association in *Cooper*, *see* note 7 *supra*, is the erroneous assertion that this Court's decision in *Granholm* should be interpreted "to mean that the dormant Commerce Clause applies only to state laws that regulate alcohol *producers* or *products*." *See* Pet. at 12. The apparent source of this argument is the *Granholm* Court's reference to discrimination

against out-of-state producers when it invalidated state laws that prevented out-of-state wineries but not in-state wineries from engaging in direct shipments, and on the Court's passing observation that the three-tier system previously had been recognized as "unquestionably legitimate." 544 U.S. at 489 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990)). But these passages from *Granholm* appear in the portion of the opinion that *rejected* the States' argument "that any decision invalidating their [discriminatory state] shipment laws would call into question the constitutionality of the three-tier system." 544 U.S. at 488. In the same way, nothing in the opinions below calls into question "the constitutionality of the three-tier system," so long as the State does not structure that system in a manner that masks blatant economic protectionism.

Petitioner is asking this Court to rule that the States are free to utilize their authority under the Twenty-first Amendment to immunize state regulation of the sale and distribution of alcohol from the nondiscrimination principle of the Commerce Clause. In *Granholm*, Michigan and New York invited the same result and this Court declined the invitation in terms that are fully applicable here. In fact, in *Granholm*, the Court squarely rejected the States' argument that the Court should overrule *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), and thereby reaffirmed that a state's right to regulate alcohol is limited by the nondiscrimination principle of the Commerce Clause. 544 U.S. at 487-88. The *Granholm* Court recognized that "[a] retreat from *Bacchus* would also undermine

Brown-Forman [*Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986)], and *Healy* [v. *Beer Institute, Inc.*, 491 U.S. 324 (1989)]." The Court readily rejected the States' contentions because each of those prior cases "lend[s] significant support to the conclusion that the Twenty-first Amendment does not immunize all [liquor] laws from Commerce Clause challenge." 544 U.S. at 488.

Petitioner presents a variation on the same theme rejected in *Granholm* by claiming that the Commerce Clause should apply only to State discrimination against *producers* of alcoholic beverages or their products, leaving the States free to engage in economic protectionism with respect to the wholesale and retail tiers of the liquor industry. This more limited approach ignores the fact that the Commerce Clause, as reaffirmed in *Granholm*, has always applied to "'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.'" *Id.* at 472 (quoting *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 99 (1994)) (emphasis supplied). Petitioner ignores the holding in *Granholm* that "'[w]hen a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, we have generally struck down the statute without further inquiry.'" *Id.* at 487 (quoting *Brown-Forman*, *supra*, at 579) (emphasis supplied). Petitioner ignores the passage in *Granholm* expressly noting that "States may not enact laws that burden out-of-state producers *or*

shippers simply to give a competitive advantage to in-state businesses." 544 U.S. at 772 (emphasis supplied). And Petitioner disregards the fact that in reviewing the statutes in question, the *Granholm* Court observed that New York's requirement for an out-of-state winery to maintain an in-state presence in order to enjoy the benefits of direct shipment "runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* at 475 (quoting *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 72 (1963)).

In short, when fully and fairly analyzed (as in the majority opinion below), there is nothing in *Granholm* to suggest—for the alcoholic beverages industry alone—that the Commerce Clause's principle of non-discrimination applies only to producers, and does not prohibit the states from withholding licenses from prospective wholesalers or retailers for the sole reason that their owners reside in other states. *See also Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980) (invalidating a Florida law that prohibited out-of-state banks from owning or controlling in-state businesses seeking to provide investment services to Florida residents because "the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition").

The true meaning of *Granholm*, and its impact on discriminatory durational residency requirements, has not been lost on reviewing courts. In her majority opinion, Judge Moore analyzed *Granholm* closely, took into account this Court's prior decisions rejecting

Twenty-first Amendment defenses to protectionist liquor regulations, and reached the right result. *See* Pet. App. at 16a-23a. The Court's opinion was consistent with the repeated rulings of the Fifth Circuit in determining that the Texas durational residency requirements have been properly enjoined since 1991. *Id.* at 24a- 27a.

In rejecting Judge Sutton's view that the Twenty-first Amendment grants the States nearly unfettered authority over "alcohol distribution as opposed to production," the Sixth Circuit majority correctly determined that *Granholm* and the decisions that it reaffirmed establish that the nondiscrimination principle of the Commerce Clause applies both to the producers of alcoholic beverages and to those engaged in the wholesale and retail distribution of those products. *Id.* at 20a-22a, n.7. Moreover, even Judge Sutton was forced to conclude that critical aspects of Tennessee's durational residency requirements for retail licensees could not survive Commerce Clause scrutiny, even if the States were granted virtually free rein to dictate local ownership requirements for licensed package stores. *Id.* at 54a-55a. The level of discrimination against out-of-state business owners evidenced in the Tennessee durational residency requirements demonstrates the wisdom of Justice Scalia's observation in *Healy* that "[t]he discriminatory character [of the challenged statute] eliminates the immunity afforded by the Twenty-first Amendment." 491 U.S. at 344 (concurring opinion).

Because the Court of Appeals' opinion in this case is so clearly correct, and because its cogent decision should help to inter the misinterpretations of *Granholm* previously advanced by some States and repeatedly endorsed by the entrenched local retailers who seek the benefits of economic protectionism, this Court should reserve plenary review for a future case in which a reviewing court has accepted Petitioner's erroneous premise that a blatantly discriminatory durational residency requirement is somehow protected from Commerce Clause scrutiny by the Twenty-first Amendment.

CONCLUSION

For all the reasons addressed herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. MURPHY
Counsel of Record
JOHN J. CONNOLLY
ALICIA SHELTON
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, MD 21202
(410) 332-0444
wmurphy@zuckerman.com

Counsel for Respondent Tennessee Fine Wines and Spirits, LLC dba Total Wine Spirits Beer & More

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, *ET AL.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Avenue North,
Suite 340-M
Nashville, TN 37201

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THE COURTS OF APPEALS ARE SPLIT ON THE QUESTION PRESENTED 2

A. The License-Renewal and 100%-Stockholder Requirements Are not At Issue 2

B. Total Wine Cannot Deny the Clear Division of Authority on the Constitutionality of the Two-Year Durational-Residency Requirement 4

II. THE QUESTION PRESENTED IS IMPORTANT 6

III. THE SUPPOSED VEHICLE PROBLEMS TOTAL WINE IDENTIFIES ARE ILLUSORY 7

IV. THE SIXTH CIRCUIT'S DECISION IS WRONG 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Bacchus Imports, Ltd. v. Dias,
460 U.S. 263 (1984) 12

Brooks v. Vassar,
462 F.3d 341 (4th Cir. 2006) 6

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 11

Cooper v. Tex. Alcoholic Beverage Comm'n,
820 F.3d 730 (5th Cir. 2016) 4, 8, 9

Granholm. Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009) 5, 6, 11

Granholm v. Heald,
544 U.S. 460 (2005) 11

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989) 12

Hollingsworth v. Perry,
570 U.S. 693 (2013) 9

Investment Co. Inst. v. Camp,
401 U.S. 617 (1971) 8

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 8

Manuel v. City of Joliet, Ill.,
137 S. Ct. 911 (2017) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Southern Wine & Spirits v. Div. of Alcohol & Tobacco, 731 F.3d 799 (8th Cir. 2013) 4, 5, 10, 12

Sturgeon v. Frost, 136 S. Ct. 1061 (2016) 10

STATUTES

Tenn. Code Ann. § 1-3-110 3

Tenn. Code Ann. § 8-6-109 9

Tenn. Code Ann. § 57-3-204 ..... 2, 12

INTRODUCTION

Petitioner Tennessee Wine and Spirits Retailers Association (the "Association") showed in its Petition what the decision below acknowledges: This case presents a square circuit split about whether durational-residency requirements violate the dormant Commerce Clause. The answer to that question, which cuts to the core of States' authority to regulate alcohol, is important. And the decision below is wrong—not least because it renders Section 2 of the Twenty-first Amendment an effective dead letter.

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More ("Total Wine," as it calls itself in its Opposition) makes two principal arguments in response.

First, Total Wine confuses matters by lumping together distinct provisions of Tennessee law. As both the majority and the dissent below agreed, however, the different provisions of Tennessee's liquor law are severable. And Total Wine has done nothing to undermine the clear split as to the *only* statutory provision at issue in the Petition: the two-year durational-residency requirement for new license applicants.

Second, Total Wine complains that Tennessee has been insufficiently enthusiastic in defending its law. But, as Total Wine does not dispute, the Association has both the legal standing and the practical ability to litigate the Question Presented no matter what the State's role. In any event, Tennessee law obligates the State's Attorney General to defend Tennessee law, as he has steadfastly done at every stage of this litigation.

Total Wine's remaining arguments merely try to muddy clear waters. This petition checks all the certworthiness boxes: a square split, on an important issue, with an erroneous decision below. The Court should grant certiorari.

ARGUMENT

I. THE COURTS OF APPEALS ARE SPLIT ON THE QUESTION PRESENTED.

Faced with a circuit split, Total Wine attempts a sleight of hand by repeatedly invoking two provisions of Tennessee law that are severable from the two-year residency requirement for initial license applicants: a ten-year residency requirement for license renewals and a 100%-residency requirement for corporate stockholders. Tenn. Code Ann. § 57-3-204(b)(2)(A), (b)(3)(A), (B), & (D). These other provisions—which were never even properly at issue below, let alone raised in the Petition as a basis for certiorari—have nothing to do with the clear, acknowledged division of authority on the constitutionality of the two-year durational-residency requirement.

A. The License-Renewal and 100%-Stockholder Requirements Are Not At Issue.

The Petition seeks certiorari about the constitutionality of the two-year durational-residency requirement for the initial issuance of a retail liquor license in Tennessee. As the complaint makes clear, this case is, and has always been, about that provision. The State filed this lawsuit seeking a "declaratory order that construes the constitutionality *of the two-year residency requirement*." D.Ct. Dkt. 1-1, Compl. at 1 (emphasis added). Because

Respondents were not pre-existing license holders, the ten-year requirement for renewals has nothing to do with them. Nor does the 100%-stockholder requirement have any bearing on Total Wine's license because, as a Tennessee LLC, it does not purport to issue stock. And it concedes that *none* of its members are Tennessee residents. *See* Opp'n Br. at 10.

To be sure, the majority and dissent below both opined that the renewal and 100%-stockholder requirements would fail constitutional scrutiny. *See* Pet. App. 2a, 54a–55a. But there was no need for the court to address those provisions. And all panelists agreed—and Total Wine nowhere disputes—that the various requirements of Tennessee's liquor laws are severable from each other under Tennessee law. *See id.* at 33a–37a, 54a–55a; Tenn. Code Ann. § 1-3-110 (providing that "the sections, clauses, sentences and parts of the Tennessee Code are severable"). So Judge Sutton teed up the issue exactly right: Regardless of the constitutionality of the license-renewal or 100%-stockholder requirements, this case—like Respondents' entitlement to licenses—turns exclusively on the constitutionality of Tennessee's two-year durational-residency requirement for the initial issuance of retail liquor licenses. Pet. App. 54a.

There is nothing anomalous about that. Cases often turn on one aspect of a statutory scheme, without calling an entire legislative framework into question. That is the point of severability.

B. Total Wine Cannot Deny the Clear Division of Authority on the Constitutionality of the Two-Year Durational-Residency Requirement.

As explained in the Petition and acknowledged by all three members of the panel below, Tennessee's durational-residency requirement implicates a clear split: the Fifth and Sixth Circuits have held that such requirements violate the dormant Commerce Clause; the Eighth Circuit has held that they fall within States' Twenty-first Amendment authority; and the Second and Fourth Circuits have adopted the same approach as the Eighth Circuit in cases involving different kinds of residency requirements. Stripped of its reliance on the inapposite renewal and 100%-stockholder requirements, Total Wine's Opposition does not seriously contend otherwise.

1. For starters, Total Wine does not try to distinguish *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016) (*Cooper II*). For good reason: The Sixth Circuit majority expressly adopted *Cooper II*'s reasoning. Pet.App. 15a. And Judge Sutton acknowledged his and the Eighth Circuit's disagreement with it. *Id.* at 53a.

2. Total Wine tries unsuccessfully to distinguish *Southern Wine & Spirits v. Div. of Alcohol & Tobacco*, 731 F.3d 799 (8th Cir. 2013). It notes that the applicant there had waived the argument that the statute was motivated exclusively by economic protectionism. *See* Opp'n Br. 18–19. But the Eighth Circuit addressed that argument anyway. *See id.* at 807–09. In rejecting it, the court relied on a statutory "purpose clause," which, like Tennessee's, provides that the legislature intended the residency

requirement "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals." 731 F.3d at 808 (quoting Mo. Rev. Stat. § 311.015). The court also dismissed the plaintiffs' reliance on reported statements of a single legislator. For one thing, "a single legislator's views about the purpose of the residency requirement" cannot be imputed to the entire legislature. *Id.* For another, an "inten[tion] to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri" accords with a legitimate purpose to limit and responsibly regulate in-state liquor sales. *Id.*; *cf.* Opp'n App. 9a (statements about limiting "interstate whiskey" explained as Tennessee's effort to "cut down on the sale of liquor" and "prevent more people from getting drunk").

Total Wine thus offers no viable distinction between *Southern Wine* and this case—which is unsurprising, because Judges Moore and Sutton saw no distinction, either. *See* Pet. App. 11a, 15a, 51a. Indeed, Missouri's three-year durational-residency requirement, which applies to each corporate director and officer, is "nearly identical to Tennessee's" in every relevant respect. *Id.* at 51a (Sutton, J., dissenting); *see Southern Wine*, 731 F.3d at 802 (citing Mo. Rev. Stat. § 311.060.3).

3. Total Wine objects that the Second and Fourth Circuits' decisions involved different kinds of residency-related restrictions. *See* Opp'n Br. 19–21. But the Petition acknowledged that. Pet. 23. The point is that both decisions "turned on the same core question as the decision below, and the Fifth and Eighth Circuit durational-residency cases: In the wake of *Granholm*, '[d]oes scrutiny under the dormant

Commerce Clause apply only when an alcoholic-beverages law regulates producers or products?'" *Id.* (quoting Pet.App. 11a). Indeed, both the majority and the dissent below recognized that the Second and Fourth Circuits confronted the same basic question about "reconcil[ing] [this Court's] cases." Pet. App. 11a–12a; *see also id.* at 67a–68a.[1]

II. THE QUESTION PRESENTED IS IMPORTANT.

Total Wine does not dispute the importance of granting certiorari when lower courts diverge about the constitutionality of state laws. *See* Pet. 25. Nor does it dispute that prominent jurists are "at a loss in seeking to figure out what the Twenty-First Amendment means" after *Granholm*. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009) (Calabresi, J., concurring); *see* Pet. App. 25a–26a (citing cases).

Instead, Total Wine quibbles with the Association's tally of 21 States' durational-residency requirements. *See* Opp'n Br. 21–24. But regardless of any minor differences among those laws, or how they apply to various entities, they all implicate the same fundamental question about the interaction of

---

[1] Total Wine suggests that Judge Traxler took no position on the dormant Commerce Clause issue in *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006). *See* Opp'n Br. 20–21 & n.5. But Judge Traxler fully concurred in the judgment—including the decision upholding Virginia's Personal Import Exception. Moreover, Judge Traxler joined Judge Niemeyer's explication of the governing principles from *Granholm*, as well as his conclusion that, consistent with those principles, Virginia's law was a valid exercise of the State's Twenty-first Amendment authority. *See Brooks*, 462 F.3d at 349–52, 354.

the Twenty-first Amendment and the dormant Commerce Clause post-*Granholm*.

Total Wine insists that it is possible for some out-of-state retailers to operate in 7 of those States through appropriate registration or designation. *See* Opp'n Br. 22. Even on Total Wine's terms, that says nothing about the 14 other laws the Association cited. And by Total Wine's own lights, courts have already prevented 5 States (including Tennessee) from enforcing durational-residency requirements. *See id.* at 23–24. A question with such wide-ranging consequences is more than important enough to warrant certiorari.

III. The Supposed Vehicle Problems Total Wine Identifies Are Illusory.

This case presents a clean vehicle. It is a declaratory-judgment action raising a single, dispositive question that was preserved and decided at each stage of this litigation. The three purported vehicle problems that Total Wine gins up are irrelevant distractions.

1. Total Wine argues that Tennessee has not defended its law consistently or persuasively. *See* Opp'n Br. 24–27. Even if that were true, it would be irrelevant. The Association has both the standing and the practical ability to litigate the Question Presented in its own right. Total Wine doesn't contend otherwise. Indeed, Tennessee named the Association as a party to the original Complaint, apparently recognizing the interests of the Association's members and expecting that the Association would carry the laboring oar in this litigation. And the Association has a concrete interest in challenging an injunction

invalidating a law that affects its members. The Fifth Circuit in *Cooper II* held exactly that. *See* 820 F.3d at 737–40. Many decisions of this Court compel the same conclusion. *See, e.g.*, *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971) (holding that investment companies have "standing to question whether national banks may legally enter a field in competition with them"); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125, 138 (2014) (explaining that plaintiff suffering competitive injury had Article III standing, and that "diversion of sales to a direct competitor may be the paradigmatic direct injury").

In any event, Tennessee's steady defense of its law in this litigation belies Total Wine's characterization of the State's position. *See* Opp'n Br. 24–27. The current Attorney General—unlike the former Attorney General who authored the opinions to which Total Wine refers, *id.* at 7–8—has never wavered in defense of Tennessee's liquor laws. He filed this lawsuit to obtain a declaratory judgment about the constitutionality of the State's two-year residency requirement. *See* D.Ct. Dkt. 1-1, Compl. 1 & ¶ 27. He then defended the law in both the District Court and the Sixth Circuit. *See* D.Ct. Dkt. 73, at 1 (arguing that "Tennessee's residency requirement . . . does not violate the dormant Commerce Clause"); Ct. App. Dkt. 32, at 3 ("Tennessee's residency requirement for retail liquor licenses is constitutional"). It is unremarkable that the State did not seek divided argument in the Sixth Circuit, given that its "position on the constitutionality of the residency requirements is the same as that of the Association." Ct. App. Dkt. 50, ¶¶ 6–7 (motion regarding oral argument). Nor is the

State's decision to conserve its limited resources and initially waive response to the Petition of any moment. Tennessee law *obligates* the Attorney General to "defend the constitutionality and validity of all legislation of statewide applicability"—or else notify the state legislature, so that it may employ outside counsel. *See* Tenn. Code Ann. § 8-6-109(b)(9), (c). In the absence of any such notification, there is every reason to believe that, if certiorari is granted, the Attorney General will continue to defend Tennessee law.

Finally, Total Wines gestures at *Hollingsworth v. Perry*, 570 U.S. 693 (2013), which it meekly characterizes as "somewhat similar." Opp'n Br. 25. Quite the opposite. There, private plaintiffs sued state "officials [who] refused to defend" the challenged law at any stage of the litigation. 570 U.S. at 702. Here, the State itself sued and, at every turn, has defended its law, as it remains obligated to do. Moreover, in *Hollingsworth*, the only parties defending the law were private proponents of California's marriage restrictions who suffered no cognizable injury from a decision invalidating those restrictions. *See id.* at 707. Here, the Association represents the particularized interests of "market participant[s] seeking the enforcement of a law that, if not enjoined, would apply to both [them] and [their] competitors." *Cooper II*, 820 F.3d at 737–38; *see also* Opp'n Br. 25 (recognizing that the Association's "business interests" are at stake).

In short: The Association has standing in its own right. And the State's defense of its law in this case has been steadfast. The State's litigation strategy therefore does not affect the certworthiness of this

case, which presents a clean vehicle to resolve a square split.

2. Total Wine also suggests that the Court should deny certiorari because Respondents pressed an alternative Privileges and Immunities theory that the courts below never addressed. *See* Opp'n Br. 27–29. But this Court grants certiorari all the time to decide issues that the lower courts resolved below, even when a respondent raised alternative arguments that the lower courts never reached. *See, e.g.*, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 922 (2017) (remanding for consideration of an argument "never confronted" below, as well as "any other still-live issues"); *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016) (similar). At most, Total Wine's Privileges and Immunities argument is a question for remand.

3. Finally, Total Wine is wrong to suggest that the Court should deny certiorari because Total Wine has already obtained a license. *See* Opp'n Br. 2–3 & n.1, 13–14, 26. The absence of a stay pending appeal—which is appropriate only in rare circumstances—has no bearing on the certworthiness of a petition. Moreover, it was Total Wine's choice to set up shop while appeals were still pending. Indeed, when Total Wine opened its doors on June 27th, it did so knowing that the Association had already received an extension of time to petition for a writ of certiorari. Total Wine thus accepted the risk that the decision below could be reversed and its license revoked.

IV. THE SIXTH CIRCUIT'S DECISION IS WRONG.

Judge Sutton's dissent below and Judge Colloton's majority opinion in *Southern Wine* cogently explain why Total Wine's understanding of the Twenty-first

Amendment is wrong. Contrary to Total Wine's suggestion, *see* Opp'n Br. 29–30, those opinions—like the Association's position—are based not on a single line from *Granholm*, but on the text, history, and purpose of the Twenty-first Amendment and the dormant Commerce Clause. Nor do those opinions argue that the Twenty-first Amendment "immunize[s] all [liquor] laws from Commerce Clause challenge." *Id.* at 31 (quoting *Granholm v. Heald*, 544 U.S. 460, 488 (2005)). Instead, they simply apply *Granholm*'s holding that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489.

It is Total Wine's position, not the Association's, that cannot be squared with this Court's precedents. This Court has consistently held that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause," *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984)—an exception that gives States "virtually complete control" over "how to structure the[ir] liquor distribution system[s]," *Granholm*, 544 U.S. at 488. As Total Wine would have it, however, the dormant Commerce Clause would trump the Twenty-first Amendment every time, leaving Section 2 of that Amendment with no substantive role to play.

Total Wine faults the State and the Association for "offer[ing] no evidence" about the purpose of the durational-residency requirement. Opp'n Br. 5, 25. But Total Wine neither explains what sort of "evidence" it believes was required nor identifies the source of that purported requirement. Tennessee's legislature enacted a statement of legislative purpose

specifically about the durational-residency requirement. *See* Tenn. Code Ann. § 57-3-204(b)(4). Total Wine complains that the legislature adopted this statement after the durational-residency requirement itself. *See* Opp'n Br. 6, 8–9. But, as the Eighth Circuit explained in rejecting the same argument, there is no reason "a later legislature—considering a preexisting law useful but perhaps for different reasons than its predecessor—cannot supplant an earlier legislature's intended purpose by enacting an express statutory purpose provision." 731 F.3d at 809.

In the end, Total Wine's position boils down to two points. *First*, invoking cases like *Bacchus Imports, Ltd. v. Dias*, 460 U.S. 263 (1984), and a concurring opinion in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), it argues that durational-residency requirements fall outside the Twenty-first Amendment because they serve no possible legitimate purpose. But that just goes to the crux of the dispute between the Eighth Circuit (and Judge Sutton) and the Fifth and Sixth Circuits. *Second*, Total Wine argues that, because the State could have accomplished its goals in some other manner, it had to do so. But that is the very point of the Twenty-first Amendment: to give States the power to choose how to achieve their goals concerning the sale of liquor. Tennessee's reasonable judgment that "[p]romoting responsible consumption and orderly liquor markets" is best accomplished by requiring that retailers be members of the communities they serve is entitled to respect. Pet.App. 50a (Sutton, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

September 4, 2018

Respectfully submitted,

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Avenue
North, Suite 340-M
Nashville, TN 37201

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, *ET AL.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

JOINT APPENDIX

Carter G. Phillips
Counsel of Record
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner

Caption Continued on Inside Cover

PETITION FOR CERTIORARI FILED JULY 20, 2018
CERTIORARI GRANTED SEPTEMBER 27, 2018

Michael Eugene Bindas
Counsel of Record
Institute for Justice
600 University Street
Suite 1730
Seattle, WA 98101

Counsel for Respondent
Affluere Investments, Inc.

Joseph F. Whalen
Counsel of Record
Associate Solicitor
General
War Memorial Building
301 6th Avenue North
Nashville, TN 37243

Counsel for Respondent
Clayton Byrd, Executive
Director of the Tennessee
Alcoholic Beverage
Commission

Caption Continued from Front Cover

TABLE OF CONTENTS

Page

Docket Entries, Byrd v. Tennessee Wine and Spirits Retailers Association, No. 17-5552 (6th Cir.) 1

Docket Entries, Byrd v. Tennessee Wine and Spirits Retailers Association, No. 3:16-cv-02738 (M.D. Tenn.) 3

MATERIALS FROM DISTRICT COURT PROCEEDING

Complaint for Declaratory Judgment, Dkt. 1-1 (Sept. 21, 2016) 10

Answer of Defendant, Affluere Investments, Inc. d/b/a Kimbrough Fine Wine & Spirits, Dkt. 1-2 (Oct. 13, 2016) 19

Memorandum Opinion of the Court, Dkt. 52 (Jan. 6, 2017) 26

Motion for Partial Summary Judgment, Dkt. 55 (Jan. 20, 2017) 46

Declaration of Edward Cooper, Dkt. 55-1 (Jan. 20, 2017) 50

Statement of Facts in Support of Motion for Partial Summary Judgment, Dkt. 55-2 (Jan. 20, 2017) 53

Motion for Preliminary Injunction, Dkt. 63 (Jan. 30, 2017) 57

Declaration of Douglas W. Ketchum, Dkt. 63-1 (Jan. 2017) 62

Affidavit of Bill Dunn, Dkt. 63-2 (Jan. 26, 2017) 66

TABLE OF CONTENTS
(continued)

Page

Plaintiff's Response to Statement of Facts in Support of Tennessee Fine Wine & Spirits, LLC's Motion for Partial Summary Judgment, Dkt. 73-1 (Feb. 10, 2017) 69

Affidavit of Clayton Byrd, Dkt. 73-2 (Feb. 10, 2017) 74

Affluere's Counterclaim for Injunctive Relief, Dkt. 78 (Jan. 30, 2017) 77

Amended Answer of Tennessee Fine Wine & Spirits Retailers Association, Dkt. 80 (Feb. 2, 2017) 84

Defendant's Response to Tennessee Fine Wine & Spirits, LLC's Statement of Facts in Support of Its Motion for Partial Summary Judgment, Dkt. 91 (Apr. 6, 2017) 92

Notice of Filing, Dkt. 96 (Apr. 12, 2017) 97

Declaration of W. Justin Adams, Dkt. 96-1 (Apr. 12, 2017) 99

Order Granting Partial Summary Judgment, Dkt. 99 (Apr. 14, 2017) 106

Order Denying Motion for Preliminary Injunction, Motion to Dismiss, and Motion for Protective Order, Dkt. 101 (Apr. 14, 2017) 107

Byrd, et al. v. Tennessee Wine and Spirits Retailers Association
No. 17-5552
United States Court of Appeals for the Sixth Circuit

Date Filed	#	Docket Text
05/15/2017	1	Civil Case Docketed. Notice filed by Appellant Tennessee Wine and Spirits Retailers Association. Transcript needed: y. (RB) [Entered: 05/15/2017 09:27 AM]
02/21/2018	54	OPINION and JUDGMENT filed : The district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) in violation of the dormant Commerce Clause is AFFIRMED, and we SEVER those provisions from the Tennessee statute. Decision for publication. Martha Craig Daughtrey, Karen Nelson Moore (AUTHORING), and Jeffrey S. Sutton (CONCURRING IN PART AND DISSENTING IN PART), Circuit Judges. (CL) [Entered: 02/21/2018 11:53 AM]

Date Filed	#	Docket Text
03/15/2018	55	MANDATE ISSUED with no costs taxed. (JC) [Entered: 03/15/2018 10:11 AM]

Byrd, et al. v. Tennessee Wine and Spirits Retailers Association
No. 3:16-cv-02738
United States District Court
for the Middle District of Tennessee

Date Filed	#	Docket Text
10/19/2016	1	NOTICE OF REMOVAL by Tennessee Wine and Spirits Retailers Association from Chancery Court for Davidson County, Tennessee, case number 16-103-II. $400 Filing fee paid—via Credit Card. (Attachments: # 1 Exhibit 1—Complaint and Summons, # 2 Exhibit 2—Chancery Court Pleadings, # 3 Exhibit 3—AG Opinion Nos. 12-59 and 14-83, # 4 Attachment Civil Cover Sheet)(eh) (Entered: 10/19/2016)
1/06/2017	52	MEMORANDUM OPINION OF THE COURT. Signed by Chief Judge Kevin H. Sharp on 1/6/2017. (DOCKET TEXT SUMMARY ONLY—ATTORNEYS MUST OPEN THE PDF AND READ THE ORDER.)(eh) (Entered: 01/06/2017)

Date Filed	#	Docket Text
01/06/2017	53	ORDER: For the reasons explained in the Memorandum filed contemporaneously herewith, the Court rules as follows: 1) Tennessee Wine and Spirits Retailers Association's Motion to Strike (Docket No. 32) is hereby DENIED. 2) Tennessee Wine and Spirits Retailers Association's Motion to Realign Parties (Docket No. 24) is hereby GRANTED. Tennessee Wine and Spirits Retailers Association is the Defendant and Tennessee Fine Wines and Spirits, LLC (d/b/a Total Wine Spirits Beer & More), Affluere Investments, Inc. (d/b/a Kimbrough Fine Wine & Spirits), and Clayton Byrd are the Plaintiffs. 3) Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) and Affluere Investments, Inc.'s (d/b/a Kimbrough Fine Wine & Spirits) Motions to Remand (Docket Nos. 9 , 20) and their requests for attorney's fees are hereby

Date Filed	#	Docket Text
		DENIED. The Court retains jurisdiction over this suit. With these rulings, Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion to Ascertain Status (Docket No. 40) is hereby DENIED AS MOOT. Signed by Chief Judge Kevin H. Sharp on 1/6/2017. (eh) (Entered: 01/06/2017)
01/20/2017	55	MOTION for Partial Summary Judgment by Tennessee Fine Wines and Spirits, LLC. (Attachments: # 1 Exhibit Exhibit 1—Declaration of Edward Cooper, # 2 Attachment Statement of Facts in Support of Motion for Partial Summary Judgment)(Adams, Walter) (Entered: 01/20/2017)
01/30/2017	63	MOTION for Preliminary Injunction by Affluere Investments, Inc.. (Attachments: # 1 Exhibit Exhibit 1—Declaration, # 2 Exhibit Exhibit 2—Affidavit)(Dennen, Keith) (Entered: 01/30/2017)

Date Filed	#	Docket Text
02/10/2017	73	RESPONSE to Motion re 55 MOTION for Partial Summary Judgment filed by Clayton Byrd. (Attachments: # 1 Attachment Plaintiff Clayton Byrd's Response to the Tennessee Fine Wine and Spirits, LLC ("Total Wine")'s Statement of Facts in Support of its Motion for Partial Summary Judgment, # 2 Attachment Affidavit of Clayton Byrd)(Kirklen, Linda) (Entered: 02/10/2017)
03/09/2017	78	COUNTERCLAIM against Clayton Byrd, filed by Affluere Investments, Inc.(eh) (Entered: 03/09/2017)
03/09/2017	80	AMENDED ANSWER to by Tennessee Wine and Spirits Retailers Association. (eh) (Entered: 03/09/2017)
04/06/2017	91	STATEMENT of facts . (Colbert, Richard) (Entered: 04/06/2017)
04/12/2017	96	NOTICE of Filing by Tennessee Fine Wines and Spirits, LLC re 55 MOTION for Partial Summary

Date Filed	#	Docket Text
		Judgment (Attachments: # 1 Exhibit Exhibit 1—Declaration of W. Justin Adams)(Adams, Walter) (Entered: 04/12/2017)
04/14/2017	98	MEMORANDUM OPINION OF THE COURT. Signed by Chief Judge Kevin H. Sharp on 4/14/17. (DOCKET TEXT SUMMARY ONLY—ATTORNEYS MUST OPEN THE PDF AND READ THE ORDER.)(af) (Entered: 04/14/2017)
04/14/2017	99	ORDER: For the reasons set forth in the Memorandum filed contemporaneously herewith, Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, (Docket No. 55), is hereby GRANTED. The Court declares the residency requirements under Tenn. Code Ann. § 57-3-204 unconstitutional and enjoins their enforcement. This order shall constitute the judgment in this case pursuant to Fed. R. Civ. P. 58.

Date Filed	#	Docket Text
		It is SO ORDERED. Signed by Chief Judge Kevin H. Sharp on 4/14/17. (af) (Entered: 04/14/2017)
04/14/2017	101	ORDER: Pending before the Court are the following motions: Plaintiff Affluere Investments, Inc.'s (d/b/a/ Kimbrough Fine Wine & Spirits) ("Affluere") Motion for Preliminary Injunction, (Docket No. 63); Plaintiff Clayton Byrd's ("Byrd") Motion for Protective Order, (Docket No. 81); and Plaintiff Byrd's Motion to Dismiss Plaintiff Affluere's Counterclaim for Injunctive Relief, (Docket No. 87). Because the Court has granted Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, Plaintiff Affluere's Motion for Preliminary Injunction, (Docket No. 63), and Plaintiff Byrd's Motion to Dismiss, (Docket No. 87), are hereby DENIED AS MOOT.

Date Filed	#	Docket Text
		Likewise, the Court hereby DENIES AS MOOT Plaintiff Byrd's Motion for Protective Order, (Docket No. 81). It is SO ORDERED. Signed by Chief Judge Kevin H. Sharp on 4/14/17. (af) (Entered: 04/14/2017)
05/11/2017	102	NOTICE OF APPEAL as to 99 Order Dismissing Case,, by Tennessee Wine and Spirits Retailers Association. Filing fee $ 505, receipt number 0650-2440618. (Colbert, Richard) (Entered: 05/11/2017)

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

FILED
2016 SEP 21 PM 3:19
DAVIDSON CO. CHANCERY COURT
DCRM

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION;	)	
Plaintiff,	)	
v.	)	**No. 16-1031-II**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE,	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT

INTRODUCTION

This is an action brought by Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("Commission"), by and through his counsel of record, the Attorney General and Reporter of the State of Tennessee, seeking a declaratory order that construes

EXHIBIT
1

the constitutionality of the two-year residency requirement outlined in Tenn. Code Ann. § 57-3-204(b)(2)(A) in order to determine the parties' rights under the statute. Currently, at least two nonresident entities have applied to the Commission for a retail package store license and are awaiting the Commission's decision to either grant or deny their applications.

I. PARTIES

1. Plaintiff Clayton Byrd is the Executive Director of the Tennessee Alcoholic Beverage Commission. Director Byrd is "solely responsible to the commission for the administration and enforcement of this chapter and shall be responsible for the performance of all duties and functions delegated by the commission." Tenn. Code Ann. § 57-1-105. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." Tenn. Code Ann. § 57-3-104(c)(1).

2. Defendant Tennessee Wine & Spirits Retailers Association ("TWSRA") is a Tennessee nonprofit corporation that "represents more than 600 small business owners across Tennessee," and "was founded to protect the interests of the independent package store owners across Tennessee." Tennessee Wine & Spirits Retailers Association, twsra.com, 8/25/16. Its principal office is located at 331 West College St., Pulaski, TN 38478.

3. Defendant Kimbrough Fine Wine & Spirits ("Kimbrough") is in the process of purchasing an existing store located at 1483 Union Avenue, Memphis, Tennessee 38104, at which it plans to conduct business. Kimbrough recently incorporated in

Tennessee, but its principal office and headquarters are at 3367 S. Skyhawk View Cir., West Valley City, Utah 84128.

4. Defendant Total Wine Spirits Beer & More ("Total Wine") is requesting a retail package store license for a location at 6622 Charlotte Pike, Ste. 104, Nashville, Tennessee 37209. Total Wine is incorporated in Delaware and its corporate headquarters are located at 6600 Rockledge Drive, No. 150, Bethesda, MD 20817.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to Tenn. Code Ann.§ 16-11-101 and § 16-11-102 and the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101, *et seq.*

6. Venue in this Court is proper in Davidson County pursuant to Tenn. Code Ann. § 20-4-104. Defendants are not natural persons. Their applications for retail liquor licenses are currently pending in Davidson County, and Plaintiff's decision to grant or deny the applications will occur in Davidson County. Thus, a substantial amount of the acts or omissions giving rise to this cause of action have accrued here.

III. APPLICABLE LAW

7. Tenn. Code Ann. § 57-3-204(b)(2) provides as follows:

> No retail license under this section may be issued to any individual:
>
> (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the

> commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years...

8. Since its original enactment in 1939, this provision has required either a two-year citizenship or two-year residency requirement for retail license holders. 1939 Tenn. Pub. Acts, ch. 49, §§ 7, 8.

9. In 2014, the General Assembly added an additional section, which explains the purpose of the residency requirement as follows:

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101 (b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann.§ 57-3-204(b)(4).

IV. FACTUAL ALLEGATIONS

10. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." Tenn. Code Ann.§ 57-3-104(c)(1).

11. Defendant Kimbrough is in the process of purchasing the business located at 1483 Union Avenue, Memphis, Tennessee 38104 from the current owner. The purchase is pending the Commission's approval.

12. Defendant Kimbrough has submitted an application for a retail package store license to the Commission and is awaiting a determination. Defendant Kimbrough does not meet the residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

13. Defendant Total Wine is planning to open a location in Tennessee and has submitted an application for a retail package store license to the Commission. It is also awaiting a determination. Defendant Total Wine does not satisfy the residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

14. In reliance on two Tennessee Attorney General's Opinions that specifically address the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2) and finding no other grounds for denying the nonresidents' license applications, the Commission's staff would recommend approval of both nonresidents' license applications but for the conflicting statutory residency requirement. Tenn. Att'y Gen. Ops. 14-83 and 12-59.

15. Both nonresident Defendants' applications were scheduled to be heard at the Commission's August 23, 2016, meeting but a decision on the applications was continued to the September 29, 2016,

meeting so that the Commission could explore the legal ramifications of either granting or denying retail package store licenses to nonresident applicants and consult with counsel, the Tennessee Attorney General, regarding this decision.

16. In anticipation of the Commission's decision whether to grant or deny the nonresident Defendants' applications for retail package store licenses, counsel for TWSRA has contacted Director Byrd.

17. Counsel for TWSRA has advised Director Byrd that if the Commission grants a retail package store license to a nonresident entity, Tennessee residents with retail package store licenses "would immediately file suit . . . asking a court to make a Tennessee Agency follow current Tennessee law passed by the Tennessee Legislature elected by Tennessee citizens." (Attachment "A"—Email from Kurtis J. Winstead to Director Byrd 7/16/16.)

18. Conversely, counsel for both Defendants Kimbrough and Total Wine have suggested to Director Byrd that if the Commission denies their nonresident applications for a retail package store license, they will pursue legal action against the Commission, which would likely involve a constitutional challenge to the residency requirement.

19. The threat of litigation from both resident and nonresident entities upon issuance of either decision, along with the Attorney General's Opinions regarding Tenn. Code Ann. § 57-3-204(b)(2)(A), has created uncertainty in the Commission about the correct application of the residency requirement to nonresident Defendants' applications.

20. A determination of all parties' rights under Tenn. Code Ann. § 57-3-204(b)(2)(A) through this Court's determination of the statute's constitutionality will afford relief to Director Byrd.

V. CAUSE OF ACTION

21. Plaintiff repeats and incorporates by reference all of the above allegations of the Complaint as though fully set forth herein.

22. A controversy exists regarding the constitutionality of the residency requirement contained in Tenn. Code Ann. § 57-3-204(b)(2)(A).

23. Both nonresident Defendants have suggested to Director Byrd that they will pursue legal action against the Commission if their applications are denied.

24. Counsel for the TWSRA has advised Director Byrd that it will pursue litigation against the Commission if the nonresidents' applications are granted.

25. Regardless of whether the Commission grants or denies Defendants' nonresident applications for retail liquor licenses, the State faces imminent litigation with the attendant financial cost and use of State resources.

26. Accordingly, the Commission seeks a declaratory order from the Court regarding the constitutionality of the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2)(A).

27. Such a determination is necessary for the Commission to lawfully fulfill its duties under Tenn. Code Ann. § 57-3-104(c)(1) and correctly determine

whether nonresident Defendants may be issued a retail liquor license.

VI. PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests that this Court enter judgment as follows:

1. Allowing this Complaint to be filed without cost bond as provided in Tenn. Code Ann. § 20-13-101 and issuing and serving process upon Defendants requiring them to appear and to answer this Complaint;

2. Ordering a speedy hearing of this action for declaratory judgment and advancing it on the Court's calendar pursuant to Tenn. R. Civ. P. 57;

3. Issuing a declaratory judgment that that the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2)(A) is either constitutional or unconstitutional; and

4. Awarding Plaintiff such other further relief to which he may be entitled.

Respectfully Submitted,
/s/ Herbert H. Slatery III
HERBERT H. SLATERY III (BPR 9077)
Attorney General and Reporter
/s/ Sara Beth Myers
Sara Beth Myers (BPR 29935)
Assistant Attorney General Law Enforcement and
Special Prosecutions Division
P.O. Box 20207
Nashville, TN 37202-0207 (615)532-6023

Fax (615) 532-4892
Sarabeth.Myers@ag.tn.gov

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT
AT NASHVILLE

FILED
2016 OCT 13 AM 11:43
CLERK & MASTER
CHANCERY COURT

CLAYTON BYRD in his official capacity) as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,

Plaintiff

v.

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE & SPIRITS, and TOTAL WINE SPIRITS BEER & MORE,

Defendants.

No. 16-1021-I

ANSWER OF DEFENDANT, AFFLUERE INVESTMENTS, INC. D/B/A KIMBROUGH FINE WINE & SPIRITS

The Defendant, Affluere Investments, Inc., doing business as Kimbrough Fine Wine & Spirits ("Kimbrough"), submits this Answer to the Complaint for Declaratory Judgment filed by the Plaintiff, Clayton Byrd in his official capacity as Executive Director of the Tennessee Alcoholic Beverage

Commission (the "Commission"). For its Answer, Kimbrough states as follows:

Introduction. To the extent that the Introduction of the Complaint requires a response, Kimbrough admits the allegations of the Introduction. Kimbrough affirmatively states that it submitted an application for a retailer's license to the Commission in May of 2016 (the "Application"). At its August 23, 2016 meeting, the Commission deferred consideration of the Application to its September, 27, 2016, meeting. At its September meeting, the Commission deferred consideration of the Application until resolution of this lawsuit.

Prior to filing the Application, Kimbrough entered into a contract to purchase the assets of an existing liquor store located at 1483 Union Avenue, Memphis, Tennessee 38104. The contract is contingent upon the issuance of a retailer's license by the Commission. Pursuant to the terms of the contract, the seller may terminate the contract and retain the earnest money deposit if that retailer's license is not issued on or before November 30, 2017. Consequently, Kimbrough will be damaged if its Application is not considered by the Commission prior to November 30, 2016.

Moreover, Kimbrough satisfies all requirements for issuance of a retailer's license set forth in Tennessee Code Annotated section 57-3-204 except Tennessee Code Annotated section 57-3-204(b)(2)(A) which is unconstitutional. That provision states:

> No retail license under this section may be issued to any individual: who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which

> application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years

Under this law, Kimbrough would need to be a resident for eight (8) years in order to obtain a liquor license for more than two (2) years. As stated by the Attorney General of the State of Tennessee in 2014:

> The residency requirements facially discriminate against nonresidents, and the intent expressed in Tenn. Code Ann. § 57-3-204(b)(4) does not establish a local purpose sufficient to justify the discriminatory licensing provisions.

Tenn. AG Opn. 14-83 (Sept. 12, 2014). Therefore, the Attorney General opined that the residency requirements for a retail liquor license set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A), as amended by 2014 Tenn. Pub. Acts, ch. 554, § 27, violate the Commerce Clause of the United States Constitution. Kimbrough submits that the rationale used by the Tennessee Attorney General is correct, and the statute violates the Commerce Clause of the United States Constitution.

THE PARTIES.

1. Kimbrough admits the allegations of Paragraph 1 of the Complaint.

2. Kimbrough admits the allegations of Paragraph 2 of the Complaint.

3. Kimbrough admits the allegations of the first sentence of Paragraph 3 of the Complaint. Kimbrough denies the allegations of the second sentence of Paragraph 3 of the Complaint. Kimbrough

affirmatively states that its principal offices are located at 7716 Chapel Creek Parkway North, Cordova, Tennessee 38016. Kimbrough further states that all of its shareholders, executive officers and directors are residents of the State of Tennessee and reside at that address.

4. Kimbrough admits the allegations of Paragraph 4 of the Complaint. Kimbrough affirmatively states that Total Wine's correct corporate name is Tennessee Fine Wines & Spirits, LLC.

5. Kimbrough admits the allegations of Paragraph 5 of the Complaint.

6. Kimbrough admits the allegations of Paragraph 6 of the Complaint.

7. Kimbrough admits the allegations of Paragraph 7 of the Complaint. Kimbrough affirmatively states that the correct citation is Tennessee Code Annotated section 57-3-204(b)(2)(A).

8. Kimbrough admits the allegations of Paragraph 8 of the Complaint.

9. Kimbrough denies the allegations of Paragraph 9 of the Complaint. Kimbrough affirmatively states that the provisions of Tennessee Code Annotated section 57-3-204(b)(4) speak for themselves.

10. Kimbrough admits the allegations of Paragraph 10 of the Complaint.

11. Kimbrough admits the allegations of Paragraph 11 of the Complaint.

12. Kimbrough admits the allegations of Paragraph 12 of the Complaint.

13. Upon information and belief, Kimbrough admits the allegations of Paragraph 13 of the Complaint.

14. Kimbrough admits the allegations of Paragraph 14 of the Complaint.

15. Kimbrough admits the allegations of Paragraph 15 of the Complaint.

16. Kimbrough admits the allegations of Paragraph 16 of the Complaint.

17. Kimbrough admits the allegations of Paragraph 17 of the Complaint.

18. Kimbrough admits the allegations of Paragraph 18 of the Complaint.

19. Kimbrough admits the allegations of Paragraph 19 of the Complaint.

20. Kimbrough admits the allegations of Paragraph 20 of the Complaint.

21. To the extent that Paragraph 21 of the Complaint incorporating by reference the allegations of Paragraphs 1 through 20 require a response, Kimbrough incorporates its responses contained in Paragraph 1 through 20 of this Answer.

22. Kimbrough admits the allegations of Paragraph 22 of the Complaint.

23. Kimbrough admits the allegations of Paragraph 23 of the Complaint.

24. Kimbrough admits the allegations of Paragraph 24 of the Complaint.

25. Kimbrough admits the allegations of Paragraph 25 of the Complaint.

26. Kimbrough admits the allegations of Paragraph 26 of the Complaint.

27. Kimbrough admits the allegations of Paragraph 27 of the Complaint.

28. Kimbrough denies any allegations contained in the Complaint that it has not specifically admitted in this Answer.

29. Kimbrough states that Tennessee Code Annotated section 57-3-204(b)(2)(A) violates the Constitution of the United States and specifically the Commerce Clause by virtue of its discrimination against non-residents.

30. To the extent that the Prayers for Relief contained in Paragraphs 1 through 4 require a response, Kimbrough agrees that a hearing should be held as soon as possible and, at that hearing, this Court should declare Tennessee Code Annotated section 57-3-204(b), and specifically the durational residential requirements, unconstitutional.

Dated: October 13, 2016.

RESPECTFULLY SUBMITTED,

By s/Keith C. Dennen

Keith C. Dennen, #012618
FARRIS BOBANGO, PLC
Bank of America Building
414 Union Street, Suite 1105
Nashville, Tennessee 37219
Telephone: (615) 726-1200
Facsimile: (615) 726-1776
E-Mail: kdennen@farris-law.com

Attorneys for Defendant, Affluere Investments, Inc. d/b/a Kimbrough Fine Wine & Spirits

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION	**Case No. 3:16-cv-02738**
Plaintiff,	**Judge Sharp**
V.	**Magistrate Judy Frensley**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, *et al.*,	
Defendants.	

MEMORANDUM

Pending before the Court are the following motions: Defendant Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) ("Tennessee Fine Wines") and Defendant Affluere Investments, Inc.'s (d/b/a Kimbrough Fine Wine & Spirits) ("Affluere") Motions to Remand, (Docket Nos. 9, 20), to which Defendant Tennessee Wine and Spirits Retailers Association ("the Association" or "Association") has responded, (Docket No. 23); Defendant Association's Motion to Realign Parties, (Docket No. 24), to which Defendant Tennessee Fine Wines, Defendant Affluere, and Plaintiff Clayton Byrd ("Byrd") have filed Responses in Opposition, (Docket

Nos. 30, 31, 36), and to which Defendant Association has filed replies (Docket No. 39, 42); and Defendant Association's Motion to Strike, (Docket No. 32), to which Defendant Tennessee Fine Wines has filed a Response in Opposition, (Docket No. 35). For the reasons set forth below, Defendant Association's Motion to Strike will be denied; Defendant Association's Motion to Realign Parties will be granted; and Defendant Tennessee Fine Wines' and Defendant Affluere's Motions to Remand and requests for attorney's fees will be denied.

STATEMENT OF THE CASE

Plaintiff Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("the Commission"), originally filed this action in the Chancery Court for Davidson County, Tennessee seeking a declaratory judgment regarding the constitutionality of the two-year residency requirement outlined in Tenn. Code Ann. § 57-3-204(b)(2)(A). (Docket No. 1-1). That provision provides as follows:

> No retail license under this section may be issued to any individual: Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years[.]

In addition to himself, Plaintiff Byrd listed the following as parties[1] to the action: "Defendant Tennessee Wine & Spirits Retailers Association," "Defendant Kimbrough Fine Wine & Spirits," and "Defendant Total Wine Spirits Beer & More." (*Id.* at 2, ¶¶ 2-4). In his Complaint, Plaintiff Byrd alleges the following:

The Commission oversees the issuance of alcohol licenses. Both Defendant Kimbrough Fine Wine & Spirits and Defendant Total Wine Spirits Beer & More submitted applications to the Commission for a retail package store license, but neither meets the residency requirement. Relying on two Tennessee Attorney General's Opinions finding the residency requirement unconstitutional and finding no other reason to deny the nonresidents' license application, the Commission otherwise would recommend approving the pending applications. The Commission postponed making a decision on the applications in order to explore the legal consequences of either granting or denying the licenses and to consult with counsel, the Tennessee Attorney General. In anticipation of the decision, counsel for Defendant Tennessee Wine & Spirits Retailers Association contacted Plaintiff Byrd and advised that, "if the Commission grants a retail package store license to a nonresident entity, Tennessee residents with retail package store licenses 'would immediately file suit . . . asking a court to make a Tennessee Agency follow current Tennessee law passed by the Tennessee Legislature elected by

---

[1] When the Court describes the allegations in Plaintiff Byrd's Complaint, the Court refers to the parties in the same manner in which Plaintiff Byrd does.

Tennessee citizens.'" (*Id.* at 5, ¶ 17). Counsel for both Defendant Kimbrough Fine Wine & Spirits and Defendant Total Wine Spirits Beer & More "have suggested to Director Byrd that if the Commission denies their nonresident applications for a retail package store license, they will pursue legal action against the Commission, which would likely involve a constitutional challenge to the residency requirement." (*Id.* at 5, ¶ 18). Plaintiff Byrd further asserts that "[t]he threat of litigation from both resident and nonresident entities upon issuance of either decision, along with the Attorney General's Opinions regarding Tenn. Code. Ann. § 57-3-204(b)(2)(A), has created uncertainty in the Commission about the correct application of the residency requirement to nonresident Defendants' applications." (Id. at 5, ¶ 19).

Defendant Association filed a Notice of Removal pursuant to 28 U.S.C. § 1446(b) on October 19, 2016, removing the case to this Court based on this Court's federal question jurisdiction under 28 U.S.C. § 1331. Defendant Tennessee Fine Wines and Defendant Affluere seek to remand the case, arguing that the Notice of Removal is defective because they did not consent or join in.

LAW AND ANALYSIS

I. Motion to Strike

As an initial matter, the Court will address Defendant Association's Motion to Strike. (Docket No. 32). The Federal Rules of Civil Procedure provides a way for courts to strike only documents or portions of documents that are pleadings. *See* Fed. R. Civ. P. 12(f). When deciding whether to strike non-pleading

documents, such as the Responses in Opposition at issue here, trial courts invoke their inherent power to manage their own dockets. *See In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996) (quoting *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982)) ("[M]atters of docket control . . . are committed to the sound discretion of the district court."); *Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (citing *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 586-88 (9th Cir. 2008) and *Hambleton Bros. Lumber Co. v. Balkin Enterprises*, Inc., 397 F.3d 1217, 1224-26 (9th Cir. 2005)) (stating that district courts' inherent power to control their own dockets "includes the power to strike items from the docket as a sanction for litigation conduct."). "However, motions to strike are generally disfavored and should only be granted when the material at issue has 'no possible relation to the controversy.'" *A Metal Source, LLC v. All Metal Sales, Inc.*, No. 1:14-CV-01020-DAP, 2016 WL 245981, at *3 (N.D. Ohio Jan. 21, 2016).

Defendant Association asks this Court to strike Defendant Tennessee Fine Wines' and Defendant Affluere's Responses in Opposition, (Docket Nos. 30, 31), to Defendant Association's Motion to Realign Parties, (Docket No. 24). To support its motion, Defendant Association argues that Defendants Tennessee Fine Wines and Affluere "used their purported responses to the Association's motion to realign the parties as vehicles to reargue their motions to remand without seeking leave of Court to file replies" pursuant to Local Rule 7.01(b). (Docket Nos. 32 at 1; 33 at 2).

Defendant Tennessee Fine Wines opposes the Motion to Strike. It asserts that Defendant Association argues against the Motions to Remand on the grounds that 1) "the parties should be realigned so that the Association is the only defendant[,]" eliminating the need for consent to removal and 2) Defendants Tennessee Fine Wines and Affluere were not "'properly joined and served' before removal." (Docket No. 35 at 1). Because those arguments are "logically related," Defendant Tennessee Fine Wines contends that it was appropriate to address the issue of allegedly not having been "properly joined and served" in its Response in Opposition to Defendant Association's Motion to Realign Parties. (*Id.* at 2).

The undersigned judge has opted out of Local Rule 7.01(b) and "does not require a motion seeking permission to file a reply." Practice and Procedure Manual for Judges and Magistrate Judges for the Middle District of Tennessee (Judge Kevin H. Sharp), § III(C)(3). For that reason alone, Defendant Association's argument in support of its Motion to Strike is unavailing. Furthermore, even though it is true that Defendant Association filed a separate Motion to Realign Parties, it clearly argued in its Response to the Motions to Remand that Defendants Tennessee Fine Wines and Affluere should be realigned as plaintiffs. (Docket No. 23 at 5-6). Given the connection between the Motions to Remand and the Motion to Realign Parties, the Court takes no issue with Defendants Tennessee Fine Wines and Affluere having advanced arguments beyond those strictly related to the Motion to Realign Parties in their Responses in Opposition to it. Therefore, Defendant Association's Motion to Strike will be denied. The

Court will consider arguments raised in the memoranda that Defendant Association sought to strike when ruling on the Motions to Remand and the Motion to Realign Parties.

II. Motions to Remand and Motion to Realign Parties

"The party seeking removal bears the burden of establishing its right thereto. All doubts arising from defective, ambiguous and inartful pleadings should be resolved in favor of the retention of state court jurisdiction. The removal statute is to be strictly construed, with all doubts resolved against removal." *Brown v. New Jersey Mfrs. Ins. Grp.*, 322 F. Supp. 2d 947, 950 (M.D. Tenn. 2004) (internal citations omitted).

A. Properly Joined and Served

Under 28 U.S.C. § 1446(b)(2)(A), "When a civil action is removed solely under section 1441(a)[2], all defendants who have been properly joined and served must join in or consent to the removal of the action." The Sixth Circuit has recognized that "a rule of unanimity . . . has been derived from the statutory language prescribing the procedure for removing a state action to federal court, . . . demand[ing] that all defendants must join in a petition to remove a state case to federal court." *Loftis v. United Parcel Serv.*,

---

[2] 28 U.S.C.A. § 1441(a) provides, "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Inc., 342 F.3d 509, 516 (6th Cir. 2003) (citing *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999)). In *Loftis*, the Sixth Circuit wrote, "Consistent with the prevailing view, we hold that all defendants in the action must join in the removal petition or file their consent to removal in writing. . . ." 342 F.3d at 516. "Failure to obtain unanimous consent forecloses the opportunity for removal under Section 1446." *Id.*

Defendant Tennessee Fine Wines argues that it did not join in Defendant Association's Notice of Removal and has not consented and will not consent to removal of the action. Defendant Affluere argues likewise. Therefore, they both contend that Defendant Association's Notice of Removal is defective, requiring the case to be remanded to the Chancery Court for Davidson County. Defendant Association argues, however, that Defendants Tennessee Fine Wines and Affluere were not properly joined and served within the meaning of § 1446(b)(2)(A) and, that being so, their consent was unnecessary.

Defendant Association supports its contention that Defendants Tennessee Fine Wines and Affluere were not properly joined by pointing this Court to the Complaint. In the Complaint, Plaintiff Byrd refers to "Defendant Total Wine Spirits Beer & More" and "Defendant Kimbrough Fine Wine & Spirits." (Docket No. 1-1 at 2, ¶¶ 3-4). According to Defendant Association, those defendants do not exist; they are nothing more than the names under which the corporate entities Tennessee Fine Wines & Spirits, LLC and Affluere Investments, Inc., respectively, propose to do business if the Commission grants them a license. Given that neither Tennessee Fine Wines

and Spirits, LLC nor Affluere Investments, Inc. is a named defendant in the Complaint, Defendant Association argues that they were not properly joined.

Defendant Association supports its contention that Defendants Tennessee Fine Wines and Affluere were not properly served by pointing the Court to the record of the Chancery Court at the time of removal. It relies on *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999) for the proposition that "the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights." With respect to summons that were issued, Defendant Association argues that the Chancery Court record contained only a copy of a summons issued to "Total Wine Spirits Beer & More" that was directed not to Tennessee Fine Wines & Spirits, LLC's registered agent, but to Attorney Alex Little at a law firm in Nashville. At the time of removal on October 19, 2016, the Chancery Court record contained no filed returns showing service of that or any other summons. Defendant Association essentially argues that Defendants Tennessee Fine Wines and Affluere were not properly served because the Chancery Court record contained neither summons issued to them using their proper legal names nor returns of service. Importantly, it contends that "there is no evidence that . . . the real parties in interest[] were properly served prior to removal of the case on October 19." (Docket No. 23 at 8).

Defendants Tennessee Fine Wines and Affluere assert that they were properly joined and served. Defendant Tennessee Fine Wines cites a case from this Court, *Brown v. New Jersey Mfrs. Ins. Grp.*, 322 F.

Supp. 2d 947 (M.D. Tenn. 2004), to support its argument that it and Defendant Affluere were "properly joined." In that case, this Court held that because the defendant business had notice of the lawsuit despite plaintiff's mistake in suing the wrong, but very closely aligned business, the time to remove the suit began to run from service of the original, misnamed complaint, making defendant's removal untimely. *Brown*, therefore, makes clear that misnaming an entity in a complaint need not be fatal. This Court holds that Defendants Tennessee Fine Wines and Affluere were properly joined despite the references to their "dba" names in the Complaint, especially because Plaintiff Byrd sufficiently identifies Defendants Tennessee Fine Wines and Affluere by stating their respective principal offices.[3]

With respect to being "properly served," Defendant Tennessee Fine Wines argues that it was served prior to the date on which Defendant Association filed its Notice of Removal as evidenced by the information on the return of service, even though the return of service

---

[3] In his Complaint, Plaintiff Byrd states that "Kimbrough recently incorporated in Tennessee, but its principal office and headquarters are at 3367 S. Skyhawk View Cir., West Valley City, Utah 84128[,]" and "Total Wine is incorporated in Delaware and its corporate headquarters are located at 6600 Rockledge Drive, No. 150, Bethesda, MD 20817." (Docket No. 1-1 at 2, ¶¶ 3-4). As Defendant Association points out for the Court, "[a]ccording to the Secretary of State, Affluere Investments, Inc., is a Tennessee corporation with its principal office in West Valley City, Utah[,]" and "[a]ccording to the Secretary of State, Tennessee Fine Wines & Spirits, LLC, is a Tennessee corporation with its principal office in Bethesda, MD[.]" (Docket No. 23 at 2-3).

had not yet been filed.[4] Furthermore, Defendant Tennessee Fine Wines correctly points out that the summons is important to directing a party to participate in a civil action only insofar as service of process has not been waived. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999) ("*Unless a named defendant agrees to waive service*, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.") (emphasis added). As such, Defendant Tennessee Fine Wines argues that because Defendant Affluere filed an answer in the Chancery Court without pleading insufficiency of process or service, Defendant Affluere waived those defenses pursuant to Tenn. R. Civ. P. 12.08 and was deemed served. Defendant Tennessee Fine Wines argues that Defendant Association cites no authority holding that 28 U.S.C. § 1446(b)(2)(A) requires service of process on a party who has answered and waived service. The Court notes that Defendant Affluere argues, on its own behalf, that it was served on September 29, 2016. But whether Defendant Affluere waived service or was served is not important in light of the evidence in the record that Defendant Affluere filed an answer and a

---

[4] A return of service was filed in the Chancery Court on October 21, 2016, after removal of the case, indicating that a summons had been sent to Total Wine Spirits Beer & More on October 17, 2016 and the return receipt, signed by one Lisa Vo on October 17, 2016, had been received on October 19, 2016. (Docket No. 14-1 at 1-2). Attorney Alex Little filed a declaration stating that he "accepted . . . service on behalf of Defendant Tennessee Fine Wines & Spirits LLC dba Total Wine Spirits Beer & More the following day, October 18, 2016." (Docket No. 14 at 1, ¶ 3).

motion for judgement on the pleadings in the Chancery Court in response to Plaintiff Byrd's Complaint.

Defendant Association, as "the party seeking removal[,] bears the burden of establishing its right thereto." *Brown*, 322 F. Supp. at 950. Defendant Association implicitly asks this Court to find that it was only required to obtain the consent of other defendants who it knew or should have known had been served by making much of the fact that no returns of service had been filed at the time of removal. However, even by that standard, Defendant Association misses the mark.

The fact that Defendant Association attached the Chancery Court pleadings to its Notice of Removal belies its assertion that "there is no evidence that . . . the real parties in interest[] were properly served prior to removal of the case on October 19." (Docket No. 23 at 8). Given that Defendant Affluere answered the Complaint, Defendant Association knew that Defendant Affluere had been served and that it needed Defendant Affluere's consent to remove. See *Crockett v. Mut. of Omaha Bank*, No. 3:12-CV-00779, 2013 WL 2384344, at *2 (M.D. Tenn. May 30, 2013), *report and recommendation adopted*, No. CIV. 3:12-0779, 2013 WL 3335113 (M.D. Tenn. July 2, 2013) (rejecting defendants' argument that they did not know other defendants had been served when they removed the case because returns of service had not yet been filed, and finding that there were "clear indications" sufficient for defendants to know that the consent of other defendants may have been required to remove the case).

Even if Defendant Association did not know that Defendant Tennessee Fines Wines had been served when in fact it had been, it knew that Defendant Affluere had been served. This Court finds that, under the circumstances, Defendant Association cannot defeat Defendants Tennessee Fine Wines' and Affluere's Motions to Remand by arguing that they had not been properly joined and served.

B. Realigning Parties

"It is [the court's] duty . . . to look beyond the pleadings, and arrange the parties according to their sides in the dispute." *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63, 69 (1941) (internal quotation marks and citations omitted). "[I]t is the court's responsibility to ensure that the parties are properly aligned according to their interests in the litigation." *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 559 (6th Cir. 2010) (citations omitted). "[P]arties [must] be aligned in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment." *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) (citations omitted).

Defendant Association argues that this Court should realign Defendants Tennessee Fine Wines and Affluere as plaintiffs, eliminating the need for them to consent to removal. It asserts that the dispute in this action centers around the constitutionality of the residency requirement for obtaining a retail package store license under Tenn. Code Ann. § 57-3-204(b)(2)(A). Defendant Association argues that Plaintiff Byrd, Defendant Tennessee Fine Wines, and

Defendant Affluere all believe a court should find it unconstitutional, whereas it thinks the residency requirement is constitutional.

Defendants Tennessee Fine Wines and Affluere, as nonresidents of Tennessee seeking licenses within the state, undoubtedly would like a court to find the residency requirement unconstitutional. Defendant Association points to a number of factors that indicate that Plaintiff Byrd takes the same position as Defendants Tennessee Fine Wines and Affluere. For example, the Tennessee Attorney General, who represents Plaintiff Byrd, has written two Opinions in which he states that the residency requirement is unconstitutional. (Docket No. 1-3). Furthermore, Plaintiff Byrd states in his Complaint that the Commission would recommend approving Defendants Tennessee Fine Wines' and Affluere's pending license applications in reliance on the Tennessee Attorney General's Opinions. However, Plaintiff Byrd argues that Defendant Association "gives the false impression that only the Association is adverse to Plaintiff when, in fact, all three defendants are adverse to Plaintiff as they have all made threats of litigation regarding Plaintiff's pending decision to grant or deny licenses to the nonresident defendants." (Docket No. 36 at 2).

The Court finds Plaintiff Byrd's argument to be specious. A close reading of the Complaint reveals that the only party that has actually threatened Plaintiff Byrd with suit is Defendant Association. In Plaintiff Byrd's own words, Defendants Tennessee Fine Wines and Affluere "have *suggested* . . . they will pursue legal action against the Commission" if their license applications are denied. (Docket No. 1-1 at 5, ¶ 18) (emphasis added). It is clear from the Complaint

that Plaintiff Byrd does not intend to follow the residency requirement absent a court's determination that it is constitutional. Given the Tennessee Attorney General's involvement in this action, it is equally clear to this Court that the interests of Plaintiff Byrd and Defendants Tennessee Fine Wines and Affluere align.

Nevertheless, Defendants Tennessee Fine Wines and Affluere argue that realignment is unnecessary. They point out, correctly, that cases cited by Defendant Association, such as *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63 (1941), *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554 (6th Cir. 2010), and *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992) all deal with realigning parties when federal jurisdiction is based on diversity. Here, however, the Court has federal question jurisdiction over the suit.

Defendant Tennessee Fine Wines contends that Defendant Association's failure to get its and Defendant Affluere's consent is a procedural, non-jurisdictional defect. *See Loftis*, 342 F.3d at 516 (characterizing the breach of the rule of unanimity as a technical defect in the removal process). It urges this Court to adopt the reasoning in *Energy Partners of Delaware, Ltd. v. Dominion Expl. & Prod., Inc.*, No. CIV.A. 05-6641, 2006 WL 1030391, at *2 (E.D. La. Apr. 18, 2006). In that case, as here, the defendant removed the suit to federal court based on federal question jurisdiction, failed to get his co-defendant's consent, and asked the court to cure that defect by realigning the co-defendant as a plaintiff. *See Energy Partners*, 2006 WL at *1. The *Energy Partners* court

stated that it has a duty to properly align parties when it relates to jurisdiction, but then reasoned that "consent to removal is not a jurisdictional issue: it is a procedural defect that can be cured. Therefore, the Court is under no *duty* to realign the parties to cure [removing defendant's] procedural failure to obtain [co-defendant's] consent." *Id.* at *4.

Defendant Tennessee Fine Wines argues that the *Energy Partners* court's conclusion is consonant with the principle that "[t]he removal statute is to be strictly construed, with all doubts resolved against removal." *See Brown*, 322 F. Supp. 2d at 950 (citing *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir.1989)). It asserts that "[w]here the district court's jurisdiction is not at stake, realigning parties to correct one defendant's procedural failure to comply with the removal statute is not consistent with strictly construing that statute." (Docket No. 30 at 4).

Defendant Association quarrels with the contention that realignment of parties is reserved only to cases involving diversity jurisdiction. It most relevantly cites *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995). In that case, removal was premised upon the presence of a federal question and the removing defendant asked the court to realign the nonconsenting defendant as a party plaintiff because the nonconsenting defendant's interest and the plaintiff's interest aligned. The court granted the removing defendant's request, noting its responsibility to align parties according to their interests in the litigation and citing cases such as *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63 (1941)

and *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992). *See* Memorandum and Order at 3-4, *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995).

This Court's search has also revealed another case in which removal was based on federal question jurisdiction, but the court realigned parties, preventing the fact that a co-defendant had not joined in the removal petition from defeating removal. *See Still v. DeBuono*, 927 F. Supp. 125, 131 (S.D.N.Y.), *aff'd*, 101 F.3d 888 (2d Cir. 1996) ("Due to the harmony of interests between petitioners and State respondents in this case, the court realigns State respondents as petitioners for purposes of removal. Thus the removal petition was not defective because of State respondents' failure to join in it."). Even in the context of a case that was removed to federal court on the basis of diversity jurisdiction, a court was willing to realign parties not to create diversity jurisdiction, but to remedy the fact that one of the named defendants had not consented to removal. *See Premier Holidays Int'l, Inc. v. Actrade Capital, Inc.*, 105 F. Supp. 2d 1336, 1341 (N.D. Ga. 2000).

Consequently, this Court will grant Defendant Association's Motion to Realign Parties. The *Energy Partners* court simply stated that it was under no duty to realign parties to cure the procedural defect of not obtaining the consent of all defendants. It never said it was forbidden to do so. This Court does not believe that realigning Defendants Tennessee Fine Wines and Affluere as plaintiffs violates the principle that the removal statute should be strictly construed with all doubts resolved against removal. The Court adopts

the reasoning in *Premier Holidays* "that no policy is served by allowing a mislabeled 'defendant' to defeat the true defendants' right to remove the case by withholding its consent." *See* 105 F. Supp. 2d at 1341. The Court agrees that "[t]he joinder requirement is designed only to insure a unanimous choice of a federal forum by the defendants. It cannot reasonably be understood to give a party who in reality occupies a position in conflict with that of other defendants a veto over the removal of the action." *See id.* (citing *First Nat. Bank of Chicago v. Mottola*, 302 F. Supp. 785, 790 (N.D. Ill. 1969), *aff'd sub nom. First Nat. Bank of Chicago v. Ettlinger*, 465 F.2d 343 (7th Cir. 1972)). Given the fact that Defendants Tennessee Fine Wines' and Affluere's interests accord with Plaintiff Byrd's and conflict with Defendant Association's, the Court will realign them.

Anticipating the possibility that this Court would realign the parties, Defendant Tennessee Fine Wines contends that the parties should be realigned such that Defendant Association is the functional plaintiff and Plaintiff Byrd is the functional defendant. Under such a realignment, Defendant Association would have no right to remove the action. *See* 28 U.S.C. § 1441(a). Defendant Tennessee Fine Wines argues that "[u]nder the functional test for party status, courts are not required to look solely to the party which initiates the claim. Rather, a court looks to which party is attempting to achieve a particular result and which party is resisting the other party's claims." *OPNAD Fund, Inc. v. Watson*, 863 F. Supp. 328, 334 (S.D. Miss. 1994) (citing *Mason City & Ft. D.R. Co. v. Boynton*, 204 U.S. 570, 579-80 (1907)). Because Plaintiff Byrd "is seeking a declaratory

judgment as a **defensive** measure against alleged threats of litigation by the Association, Tennessee Fine Wines, and [Affluere][,]" Defendant Tennessee Fine Wines urges the Court to make Plaintiff Byrd the defendant and Defendant Association the plaintiff. (Docket No. 30 at 5). The Court will decline to do so.

The cases that Defendant Tennessee Fine Wines cites, *Gen. Motors Corp. v. Gunn*, 752 F. Supp. 729 (N.D. Miss. 1990) and *In re Gardner*, No. CIV.A.06 9154, 2007 WL 625825 (E.D. La. Feb. 26, 2007), do not support its suggestion for realignment in the context of a declaratory judgment action. In those cases, the court found that the action of one of the parties, namely filing a bill of discovery in state court in *Gunn* and filing a petition to appoint an umpire in state court in *In re Gardner*, was "ancillary to the suit." *In re Gardner*, 2007 WL at *3; *Gunn*, 752 F. Supp. at 732. Thus, the court realigned those parties as the defendant. *Id.*

Those cases are qualitatively different than the case at bar. Plaintiff Byrd filed an action for declaratory judgment in order to determine the rights of all parties, including himself, under Tenn. Code Ann. § 57-3-204(b)(2)(A). His declaratory judgment action is not ancillary to the main suit as described in *Gunn* and *In re Gardner*. Simply put, it is the main suit, and Byrd is the plaintiff.

Given that Defendants Tennessee Fine Wines and Affluere will be realigned as plaintiffs, their consent to removal is not required. For that reason, the Court will deny Defendants Tennessee Fine Wines' and Affluere's Motions to Remand.

C. Attorney's Fees

As part of their Motions to Remand, Defendants Tennessee Fine Wines and Affluere seek awards of attorney's fees. Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Because the Court will deny the Motions to Remand, it will also deny the requests for attorney's fees.

CONCLUSION

For the foregoing reasons, Defendant Association's Motion to Strike, (Docket No. 32), will be denied. Defendant Association's Motion to Realign Parties, (Docket No. 24), will be granted. Defendants Tennessee Fine Wines and Affluere will be realigned as plaintiffs. Defendant Tennessee Fine Wines' and Defendant Affluere's Motions to Remand, (Docket Nos. 9, 20), and their requests for attorney's fees will be denied. Furthermore, Defendant Tennessee Fine Wines' Motion to Ascertain Status, (Docket No. 40), will be denied as moot.

A separate order shall be entered.

s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More ("Tennessee Fine Wines") hereby moves for partial summary judgment on the complaint of Clayton Byrd declaring the residency requirements for retail package store licenses set forth in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A) (the "Residency Requirements") unconstitutional under the dormant Commerce Clause and the Privileges and Immunity Clause of the United States Constitution.

In support of this motion, Tennessee Fine Wines relies on the declaration of Edward Cooper (attached

to this motion as **Exhibit 1**), its statement of facts, its supporting memorandum, and the entire record in this case and states:

1. Mr. Byrd, in his capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, initiated this action by filing a complaint seeking a declaratory judgment that the Residency Requirements are "either constitutional or unconstitutional...." (Complaint for Declaratory Judgment, DE #1-1 ["Compl."], at p. 6.)

2. State laws that discriminate against out-of-state economic interests violate the dormant Commerce Clause of the United States Constitution unless they advance a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives. U.S. Const., art. I, § 8, cl. 3; *Department of Revenue v. Davis*, 553 U.S. 328, 338 (2008); *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

3. State laws that discriminate against non-residents doing business in that state violate the Privileges and Immunities Clause of the United States Constitution unless there is a substantial reason for the difference in treatment and the discrimination practiced against nonresidents bears a substantial relationship to the state's objective. U.S. Const., art. IV, § 2, cl. 1; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985).

4. The Residency Requirements prevent Tennessee Fine Wines from obtaining a retail package store license because its members are not Tennessee residents.

5. The Residency Requirements are nearly identical to residency requirements for wineries that the Sixth

Circuit declared unconstitutional under the dormant Commerce Clause in *Jelovsek v. Bredesen*, 545 F.3d 431, 438 (6th Cir. 2008).

6. The Residency Requirements do not advance any legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

7. Tennessee Fine Wines is therefore entitled to judgment, as a matter of law, that the Residency Requirements are unconstitutional under the dormant Commerce Clause and the Privileges and Immunities Clause.

CONCLUSION

For these reasons, Tennessee Fine Wines requests the Court to grant partial summary judgment on Mr. Byrd's complaint declaring the Residency Requirements unconstitutional under the dormant Commerce Clause and the Privileges and Immunities Clause and all other necessary or proper relief.

Respectfully submitted:

BONE MCALLESTER NORTON PLLC
/s/ Edward M. Yarbrough (TN BPR # 004097)
/s/ J. Alex Little (TN BPR # 029858)
/s/ W. Justin Adams (TN BPR # 022433)
511 Union Street, Suite 1600
Nashville, Tennessee 37219
Telephone: 615-238-6300
Facsimile: 615-238-6301
eyarbrough@bonelaw.com
alex.little@bonelaw.com
wjadams@bonelaw.com

HOWELL & FISHER, PLLC

/s/ Darrell G. Townsend (TN BPR # 005460)
300 James Robertson Parkway
Nashville, Tennessee 37201
Telephone: 615-244-3370
Facsimile: 615-244-3518
dtownsend@howell-fisher.com

Counsel for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

DECLARATION OF EDWARD COOPER IN SUPPORT OF TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Edward Cooper, make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am an adult and have personal knowledge of the matters stated in this declaration.

2. I am the Vice President, Public Affairs, of Retail Services & Systems, Inc. ("Retail Services").

3. Retail Services is assisting Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer &

More ("Tennessee Fine Wines") in its efforts to own and operate one or more retail package stores in Tennessee. My duties include assisting Tennessee Fine Wines in those efforts.

4. Tennessee Fine Wines is a limited liability company created under Tennessee law on November 6, 2015.

5. The members of Tennessee Fine Wines are not Tennessee residents.

6. On July 5, 2016, Tennessee Fine Wine filed an application with the Tennessee Alcoholic Beverage Commission (the "ABC") for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application").

7. Before filing the Application, I and others acting on behalf of Tennessee Fine Wine met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license.

8. In those meetings, we asked the ABC's staff whether the residency requirements for retail package store licenses set forth in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A) (the "Residency Requirements") would prevent Tennessee Fine Wines from obtaining a license.

9. The ABC's staff advised us that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. The ABC's staff informed us that the ABC had licensed other non-residents based on those opinions.

10. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee.

11. Tennessee Fine Wines was ready, willing, and able to meet these conditions.

12. The ABC was scheduled to vote on the Application at its August 23, 2016 meeting. I and others acting on behalf of Tennessee Fine Wines attended the meeting fully believing that the ABC would conditionally approve the Application notwithstanding the Residency Requirements.

13. With no advance notice, the ABC instead voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements.

14. Then, again without notice to Tennessee Fine Wines, Mr. Byrd filed this action in Davidson County Chancery Court on September 21, 2016.

15. At its September 29, 2016 meeting, the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Edward Cooper
Edward Cooper

/s/ January 20, 2017
Date

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

STATEMENT OF FACTS IN SUPPORT OF TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More ("Tennessee Fine Wines") submits this statement of facts in support of its motion for partial summary judgment pursuant to Local Rule 56.01(b). Tennessee Fine Wines contends there is no genuine issue for trial as to the following facts:

1. The Tennessee Alcoholic Beverage Commission ("ABC") is a Tennessee state agency whose duty is to license the sale and delivery of alcoholic beverages.

(Complaint for Declaratory Judgment, DE # 1-1 ["Compl."], at ¶ 1.)

Response:

2. Plaintiff Clayton Byrd is the ABC's Executive Director. (Compl. at ¶ 1.)

Response:

3. Tennessee Fine Wines is a limited liability company created under Tennessee law on November 6, 2015. (Declaration of Edward Cooper ["Cooper Dec."] at ¶ 4.)

Response:

4. The members of Tennessee Fine Wines are not Tennessee residents. (Cooper Dec. at ¶ 5.)

Response:

5. Tennessee Fine Wines seeks to own and operate one or more retail liquor stores (referred to as "retail package stores") in Tennessee. (Cooper Dec. at ¶ 3.)

Response:

6. On July 5, 2016, Tennessee Fine Wine filed an application with ABC for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application"). (Cooper Dec. at ¶ 6.)

Response:

7. Before filing the Application, Tennessee Fine Wine's representatives met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license. (Cooper Dec. at ¶ 7.)

Response:

8. Those discussions included whether the Residency Requirements would preclude Tennessee Fine Wines from obtaining a license. (Cooper Dec. at ¶ 8.)

Response:

9. The ABC's staff advised Tennessee Fine Wine's representatives that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. (Cooper Dec. at ¶ 9.)

Response:

10. The ABC's staff stated that the ABC had licensed other non-residents based on those opinions. (Cooper Dec. at ¶ 9.)

Response:

11. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee. (Cooper Dec. at ¶ 10.)

Response:

12. The ABC was scheduled to vote on the Application at its August 23, 2016, meeting; however, the ABC voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements. (Compl. at ¶ 15; Cooper Dec. at ¶ 13.)

Response:

13. Mr. Byrd filed this action in the Chancery Court for Davidson County, Tennessee on September 21, 2016 (*See* Compl. at p. 1).

Response:

14. At its September 29, 2016 meeting the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action. (Cooper Dec. at ¶ 15.)

Response:

Respectfully submitted:

BONE MCALLESTER NORTON PLLC
/s/ Edward M. Yarbrough (TN BPR # 004097)
/s/ J. Alex Little (TN BPR # 029858)
/s/ W. Justin Adams (TN BPR # 022433)
511 Union Street, Suite 1600
Nashville, Tennessee 37219
Telephone: 615-238-6300
Facsimile: 615-238-6301
eyarbrough@bonelaw.com
alex.little@bonelaw.com
wjadams@bonelaw.com

HOWELL & FISHER, PLLC
/s/ Darrell G. Townsend (TN BPR # 005460)
300 James Robertson Parkway
Nashville, Tennessee 37201
Telephone: 615-244-3370
Facsimile: 615-244-3518
dtownsend@howell-fisher.com

Counsel for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, **Plaintiff,** **v.** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE AND SPIRITS, TOTAL WINE SPIRITS BEER & MORE,** **Defendants.**	**Case No. 3:16-cv-02738** **CHIEF JUDGE SHARP** **MAGISTRATE JUDGE FRENSLEY**

MOTION FOR PRELIMINARY INJUNCTION

Defendant, Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough"), by and through counsel, and pursuant to Federal Rule of Civil Procedure 65, moves this Court for a preliminary injunction enjoining Plaintiff, Clayton Byrd in his official capacity as the Executive Director of the Tennessee Alcoholic Beverage Commission (the "Commission"), or other persons in active concert or participation with the Commission under Federal Rule of Civil Procedure 65(d)(2) from enforcing the unconstitutional residency requirements

set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A) against Kimbrough.

In support of this motion, as set forth in more detail in the Memorandum of Law and the Affidavit of Douglas W. Ketchum dated January 27, 2017 and the Affidavit of Bill Dunn dated January 26, 2017, attached to this motion as Exhibits 1 and 2 respectively, Kimbrough states as follows:

1. Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough") is owned by Douglas W. Ketchum and his wife, Mary E. Ketchum.
2. Kimbrough entered into a letter of intent agreement (the "Agreement") to purchase from the seller, Roy Patterson, the business known as Kimbrough Towers Fine Wine located at 1483 Union Avenue, Memphis, Tennessee 38104-3726.
3. At the time of execution of the agreement, Mr. and Mrs. Ketchum were residents of the State of Utah. Their family includes a thirty-two-year-old daughter who suffers from cerebral palsy, quadriplegia, and requires twenty-four hour care.
4. The Ketchums intended to operate Kimbrough as a retail package store to meet their family's needs, including financial needs to provide for the care required for their daughter.
5. At the time of execution of the agreement, Mr. Ketchum was advised that the Tennessee Attorney General had issued two (2) official opinions that the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) were unconstitutional. Mr. Ketchum was further advised that because of these

Attorney General Opinions, the Tennessee Alcoholic Beverage Commission had issued to other persons or entities who did not satisfy the residency requirements, retail liquor license

6. With this assurance, Mr. Ketchum terminated his employment in Utah, and the Ketchum family relocated to Shelby County, Tennessee in June of 2016.

7. The Ketchums submitted their application to the Commission in May of 2016, and they were advised that the Commission would consider their application at its July 2016 meeting. For reasons unknown, the application was not on the Commission's agenda for its July 2016 meeting. The Ketchums were then told that the application would be considered at the Commission's August 2016 meeting. At that meeting, the Commission deferred consideration of Kimbrough's application to its September 2016 meeting. Prior to its September meeting, the Commission filed this action. Kimbrough's application remains pending; however, the Commission refuses to take action on that application.

8. In its Complaint, the Commission admits that the only basis it possesses for denying Kimbrough's application is the fact that Kimbrough, because of its ownership by the Ketchums, does not satisfy the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) previously declared unconstitutional by the Tennessee Attorney General. Mr. and Mrs. Ketchum were residents of the State of Utah until June of 2016.

9. Since moving to Tennessee, Mr. Ketchum has not been able to acquire full-time employment, and he does not have any health benefits. The delay in taking action by the Commission and specifically, the inability of Kimbrough as a retail package store, is causing a hardship on the Ketchum family and affects the ability to provide the best care for their daughter.

10. Recently, Mr. Ketchum was advised by the seller that if the Commission does not act on Kimbrough's application in the very near future, the seller intends to terminate the Agreement and commence marketing the business to others.

A preliminary injunction should be granted because Kimbrough has demonstrated a likelihood of success on the merits; irreparable harm will befall Kimbrough if the Commission is not enjoined; the irreparable harm to Kimbrough outweighs the harm to the Commission; and it is in the public interest to grant an injunction.

For the above-stated reasons, this Court should grant Kimbrough's motion and enter a preliminary injunction enjoining Plaintiff Clayton Byrd in his official capacity as the Executive Director of the Tennessee Alcoholic Beverage Commission (the "Commission"), or other persons in active concert or participation with the Commission under Federal Rule of Civil Procedure 65(d)(2) from enforcing the unconstitutional residency requirements set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A) against Kimbrough.

Dated: January 30, 2017

Respectfully submitted,

/s/ Keith C. Dennen

Keith C. Dennen
FARRIS BOBANGO, PLC
Bank of America Building
414 Union Street, Suite 1105
Nashville, Tennessee 37219
Telephone: (615) 726-1200
Facsimile: (615) 726-1776
Email: kdennen@farris-law.com

Attorneys for Defendant, Affluere Investments, Inc. d/b/a Kimbrough Fine Wine and Spirits

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,

Plaintiff,

v.

Case No. 3:16-cv-02738

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE And SPIRITS, TOTAL WINE SPIRITS BEER & MORE,

Defendants.

DECLARATION OF DOUGLAS W. KETCHUM

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

COMES NOW Douglas W. Ketchum, and after being first duly sworn, states as follows:

1. I, Douglas W. Ketchum, have personal knowledge of the facts set forth in this Declaration.
2. I am the co-owner of Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough") with my wife, Mary E. Ketchum. Kimbrough is a Tennessee corporation with its principal place of business located in Cordova, Shelby County, Tennessee.

3. In April of 2016, Kimbrough entered into a letter of intent ("Agreement") to purchase from Roy Patterson (the "Seller"), the business known as Kimbrough Towers Fine Wine, located at 1483 Union Avenue, Memphis, Tennessee 38104-3726 ("Business").

4. At the time of execution of the Agreement, my wife and I were residents of the State of Utah. Our family includes our thirty-two-year-old daughter who suffers from cerebral palsy, quadriplegia, and requires twenty-four hour care.

5. I was advised that the Tennessee Attorney General had issued two (2) official opinions that the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) were unconstitutional. I was further advised that because of these Attorney General Opinions, the Tennessee Alcoholic Beverage Commission ("Commission") had issued to other non-residents, and would issue to Kimbrough, a license to sell retail liquor even though Kimbrough did not satisfy those requirements.

6. Based on this information, we submitted an application for a retail liquor license to the Commission's office in Memphis. I was advised that the application was in order and would be placed on the Commission's agenda for its next meeting. At the meeting in Memphis, I was asked my state of residence and no objection was raised.

7. In anticipation of acquiring the Business, I transferred my retirement funds into a separate account to utilize as a down payment for purchase of the Business and secured a commitment for

financing through Wells Fargo Bank. I am subject to continued maintenance charges with respect to the retirement funds and my loan commitment is subject to expiration.

8. I then terminated my employment in Utah, and my family and I move to Shelby County, Tennessee in July of 2016. We have been citizens and residents of Tennessee since that date.

9. Following submission of the application, I was advised that the Commission would consider the application at its July 2016 meeting. Because the local office failed to timely submit our application to Nashville for review, the application was not on the Commission's agenda for that meeting. I was then told that the application would be considered at the Commission's August 2016 meeting. At that meeting, the Commission deferred consideration of Kimbrough's application to its September 2016 meeting. Prior to its September meeting, the Commission filed this action. Kimbrough's application remains pending; however, the Commission refuses to take action on that application.

10. In its Complaint, the Commission admits that the only basis it possesses for denying Kimbrough's application is the fact that Kimbrough does not satisfy the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) previously declared unconstitutional by the Tennessee Attorney General.

11. Since moving to Tennessee, I have not been able to acquire full-time employment, and I do not have any health benefits. The delay in taking action by

the Commission and specifically, the inability to operate Kimbrough as a retail package store, is causing a hardship on my family and affects the ability to provide the best care for our daughter.

12. Recently, I was advised by the Seller that if the Commission does not act on Kimbrough's application in the very near future, the Seller intends to terminate the Agreement and commence marketing the Business to others.

13. If that occurs, then my family and I will suffer irreparable harm because of the unique nature of the Business and its location, which I would never be able to duplicate.

FURTHER AFFIANT SAYETH NOT.

/s/ Douglas W. Ketchum
Douglas W. Ketchum

SWORN TO AND SUBSCRIBED before me this __ day of January, 2017.

Notary Public

My Commission Expires:

_____

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,

Plaintiff,

v.

Case No. 3:16-cv-02738

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE And SPIRITS, TOTAL WINE SPIRITS BEER & MORE,

Defendants.

AFFIDAVIT OF BILL DUNN

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

COMES NOW Bill Dunn, and after being first duly sworn, states as follows:

1. I, Bill Dunn, have personal knowledge of the facts set forth in this Affidavit.
2. I am a Principal with Acquisition Finders, Inc., a corporation in good standing in the State of Tennessee and represent Roy Patterson ("Seller") in the sale of Kimbrough Towers Fine Wine located at 1483 Union Avenue, Memphis, Tennessee 38104-3726 ("Business") to Affluere

Investments, Inc. a Tennessee corporation, which is wholly owned by Doug Ketchum ("Buyer").

3. I have personal knowledge of an executed letter of intent between Buyer and Seller with respect to Buyer's purchase of the Business from Seller which letter provides for a closing date of June 29, 2016.

4. The Seller, in its discretion, extended the closing date indefinitely to enable Buyer to obtain its state license with the Tennessee Alcoholic Beverage Commission ("ABC").

5. I am aware that the ABC has delayed issuance of the license to Buyer as a result of threatened litigation from the Tennessee Wine and Spirits Retailers Association.

6. I am also aware that Buyer has relocated to Memphis, Tennessee from the State of Utah and terminated full-time employment in contemplation of closing on the purchase of the Business.

7. Because Seller is not obligated to extend the Letter of Intent, Seller has advised me that unless this matter is resolved in the very near future, Seller will request me to re-market the Business and solicit other potential purchasers of the Business.

FURTHER AFFIANT SAYETH NOT.

/s/ Bill Dunn
Bill Dunn

SWORN TO AND SUBSCRIBED before me this 26th day of January, 2017.

/s/ Michael J. Evangelisti

Notary Public

My Commission Expires:

_____

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE, **Plaintiffs,** **v.** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,** **Defendant.**	**Case No. 3:16-cv-02738** **Judge Sharp** **Magistrate Judge Frensley**

PLAINTIFF CLAYTON BYRD'S RESPONSE TO TENNESSEE FINE WINE AND SPIRITS, LLC ("TOTAL WINE")'S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("Commission"), through counsel, the Tennessee Attorney General, hereby submits the following responses to Tennessee Fine

Wine and Spirits, LLC ("Total Wine")'s facts in support of its motion for partial summary judgment as follows:

1. The Tennessee Alcoholic Beverage Commission ("ABC") is a Tennessee state agency whose duty is to license the sale and delivery of alcoholic beverages. (Complaint for Declaratory Judgment, DE # 1-1 ["Compl."], at ¶ 1.)

Response: Not disputed.

2. Plaintiff Clayton Byrd is the ABC's Executive Director. (Compl. at ¶ 1.)

Response: Not disputed.

3. Tennessee Fine Wines is a limited lability company created under Tennessee law on November 6, 2015. (Declaration of Edward Cooper ["Cooper Dec."] at ¶ 4.)

Response: Not disputed.

4. The members of Tennessee Fine Wines are not Tennessee residents. (Cooper Dec. at ¶ 5.)

Response: Not disputed.

5. Tennessee Fine Wines seeks to own and operate one or more retail liquor stores (referred to as "retail package stores") in Tennessee. (Cooper Dec. at ¶ 3.)

Response: Not disputed.

6. On July 5, 2016, Tennessee Fine Wine filed an application with ABC for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application"). (Cooper Dec. at ¶ 6.)

Response: Not disputed but not material to a determination of the constitutionality of the residency requirement.

7. Before filing the Application, Tennessee Fine Wine's representatives met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license. (Cooper Dec. at ¶ 7.)

Response: Disputed but not material to a determination of the constitutionality of the residency requirement. Dir. Byrd did not meet with representatives of Tennessee Fine Wine (Total Wine) prior to the submission of its application on July 5, 2016. (Aff. Byrd ¶ 5.)

8. Those discussions included whether the Residency Requirements would preclude Tennessee Fine Wines from obtaining a license. (Cooper Dec. at ¶ 8.)

Response: Disputed but not material to a determination of the constitutionality of the residency requirement. Dir. Byrd did not meet with representatives of Tennessee Fine Wine (Total Wine) prior to the submission of its application on July 5, 2016. (Aff. Byrd ¶ 5.)

9. The ABC's staff advised Tennessee Fine Wine's representatives that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. (Cooper Dec. at ¶ 9.)

Response: Disputed only to the extent that Dir. Byrd was not a party to those discussions. (Aff. Byrd ¶¶ 5, 7.)

10. The ABC's staff stated that the ABC had licensed other non-residents based on those opinions. (Cooper Dec. at ¶ 9.)

Response: Not disputed but not material to a determination of the constitutionality of the residency requirement.

11. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee. (Cooper Dec. at ¶ 10.)

Response: Not disputed.

12. The ABC was scheduled to vote on the Application at its August 23, 2016, meeting; however; the ABC voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements. (Comp. at ¶ 15; Cooper Dec. at ¶ 13.)

Response: Not disputed.

13. Mr. Byrd filed this action in the Chancery Court for Davidson County, Tennessee on September 21, 2016 (See Compl. at p. 1).

Response: Not disputed.

14. At its September 29, 2016 meeting the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action. (Cooper Dec. at ¶ 15.)

Response: Not disputed.

Respectfully submitted,
HERBERT H. SLATERY
III

Attorney General &
Reporter
/s/Linda D. Kirklen
/s/Scott C. Sutherland
Deputy Attorney General
Linda D. Kirklen
Assistant Attorney General
Law Enforcement and
Special Prosecutions
P.O. Box 20207
Nashville, Tennessee 37202
615-741-4087
BPR No. 29935
Counsel for Plaintiff
Clayton Byrd

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE,	**Case No. 3:16-cv-02738**
Plaintiffs,	**Judge Sharp**
v.	**Magistrate Judge Frensley**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

AFFIDAVIT OF CLAYTON BYRD

STATE OF TENNESSEE
DAVIDSON COUNTY

After being duly sworn, the affiant, Clayton Byrd, states:

1. I am an adult resident of the State of Tennessee, am competent to provide the testimony herein, and make this statement based on personal knowledge.

2. I serve as the Executive Director of the Tennessee Alcoholic Beverage Association ("TABC").
3. In my capacity as Executive Director of the TABC I initiated the above-styled action by filing a complaint seeking a declaratory judgment regarding the constitutionality of the residency requirements for retail package store licenses set forth in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A).
4. I have knowledge that Tennessee Fine Wines & Spirits, LLC ("Tennessee Fine Wines") filed an application for a retail package store license with the TABC on July 5, 2016.
5. I did not meet with any representatives of Tennessee Fine Wines prior to the submission of their application on July 5, 2016.
6. The first time I met in person with representatives from Tennessee Fine Wines was in my office on July 11, 2016. TABC Assistant Director Zack Blair was in attendance at that meeting. Before that date, I was not aware Tennessee Fine Wines had applied for a retail package store license.
7. During the July 11, 2016, meeting with Tennessee Fine Wines there was no discussion regarding the residency requirements at issue in the above-styled action.
8. In a subsequent telephone conversation with David Trone of Tennessee Fine Wines on August 18, 2016, Mr. Trone did raise the issue of the residency requirements and threatened

litigation should Tennessee Fine Wines' application be declined by the TABC.

9. In the conversation with Mr. Trone on August 18, 2016, I took no position with respect to the constitutionality of the residency requirements. I did explain the dilemma of the TABC in either enforcing a statute opined to be unconstitutional by the Attorney General or not enforcing the statute and acting beyond the scope of the statute. I indicated my only goal was to act in the best interest of the state and the taxpayers if a challenge or litigation would occur as a result of either option.

10. I believe other TABC staff members at times informed Tennessee Fine Wines that the TABC had not enforced the residency requirements in the past based on two Attorney General Opinions.

Further affiant sayeth not.

/s/
AFFIANT

SWORN TO AND SUBSCRIBED before me on the 10th day of February, 2017.

/s/ Melissa S. Proctor
NOTARY PUBLIC
STATE OF TENNESSEE

Notary's printed name: /s/ Melissa S. Proctor
My commission expires July 2, 2018

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,	
Plaintiff,	
v.	**Case No. 3:16-cv-02738**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE AND SPIRITS, TOTAL WINE SPIRITS BEER & MORE,	**CHIEF JUDGE SHARP** **MAGISTRATE JUDGE FRENSLEY**
Defendants,	
and	
AFFLEURE INVESTMENTS, INC.) D/B/A KIMBROUGH FINE WINE AND SPIRITS,	

Counter-Plaintiff,	)
v.	)
	)
CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,	)
	)
Counter-Defendant.	)

COUNTERCLAIM FOR INJUNCTIVE RELIEF

INTRODUCTION

Defendant/Counter-Plaintiff, Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough"), pursuant to Federal Rules of Civil Procedure 13 and 65, files this Counterclaim for Injunctive Relief against Plaintiff/Counter-Defendant, Clayton Byrd in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("the Commission"). In support of this Counterlcaim, Kimbrough states as follows:

JURISDICTION AND VENUE

1. This case was removed pursuant to 28 U.S.C. § 1446(b) based on this Court's federal question jurisdiction under 28 U.S.C. § 1331.

2. Venue in this Court is proper.

PARTIES

3. Plaintiff/Counter-Defendant Clayton Byrd is the Executive Director of the Tennessee Alcoholic

Beverage Commission ("Commission"). Director Byrd is "solely responsible to the Commission for the administration and enforcement of this chapter and shall be responsible for the performance of all duties and functions delegated by the commission." TENN. CODE ANN. § 57-1-105. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." TENN. CODE ANN. § 57-3-104(c)(1).

4. Kimbrough is a Tennessee corporation. Kimbrough filed its articles of incorporation with the Office of the Secretary of State for the State of Tennessee on April 21, 2016, and it has continuously maintained its status as a Tennessee corporation since its incorporation. Kimbrough's principal offices are located at 7716 Chapel Creek Parkway North, Cordova, Tennessee 38016.

5. Kimbrough's sole shareholders, executive officers and director are: Douglas W. Ketchum and his wife, Mary E. Ketchum. Since June of 2016, the Ketchums have been citizens and residents of the State of Tennessee. Prior to that date, the Ketchums were citizens and residents of the State of Utah.

6. This case involves a retail liquor store located at 1483 Union Avenue, Memphis, Tennessee (the "Store") That liquor store is located on Union Avenue in the heart of Memphis Midtown area and directly adjacent to the historic Central Gardens area. The Central Gardens Area is one of Memphis most affluent areas. Consequently, it is a unique location for the retail sale of fine wines and liquors.

7. Kimbrough has entered into a letter of intent agreement (the "Agreement") to purchase the Store

from its present owner. Kimbrough plans to continue the operation of the Store as a retail liquor store. Consistent with that intent, Kimbrough has obtained loan commitments from third parties and is ready and willing to close the sale upon issuance of a retail liquor store license.

FACTUAL ALLEGATIONS

8. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." TENN. CODE ANN. § 57-3-104(c)(1).

9. Kimbrough submitted an application for a retail package store license to the Commission in June of 2016. The Commission, at its August 23, 2016 meeting, deferred consideration of Kimbrough's application until its September 29, 2016 meeting. Prior to its September 29, 2016 meeting, the Commission filed this action for declaratory judgment. In addition, the Commission deferred consideration of Kimbrough's application indefinitely during the pendency of that action.

10. As stated in its Complaint for Declaratory Judgment, the Commission has found no grounds for denying Kimbrough's application other than the fact that Kimbrough's owners have not been residents of the State of Tennessee for at least two (2) years as required by the residency requirements contained in Tennessee Code Annotated section 57-3-204(b)(2)(A).

11. In fact, in reliance on two Tennessee Attorney's General Opinions that specifically address the residency requirements in Tennessee Code Annotated section 57-3-204(b)(2)(A) and finding no other grounds for denying Kimbrough's license application, the Commission's staff recommends

approval of Kimbrough's license application but for the conflicting statutory residency requirement. Tenn. Op. Att'y Gen. 12-59; Tenn. Op. Att'y Gen. 14-83.

12. In those two opinions, Opinion 12-59 and Opinion 14-83, the Attorney General of the State of Tennessee opined that the provisions of Tennessee Code Annotated section 57-3-204(b) are unconstitutional. In those opinions, the Attorney General relied upon the decision of the United States Court of Appeals for the Sixth Circuit in *Jelvosek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008), *cert. denied*, 558 U.S. 874, 130 S.Ct. 199, 175 L.Ed.2d 127 (2009), in which that court declared the similar Two Year/Ten Year Residency Requirement contained in Tennessee's Grape and Wine Law to be unconstitutional.

13. Since 2012, the Commission has routinely granted retail liquor licenses to persons and entities that did not satisfy the residency requirements contained in Tennessee Code Annotated section 57-3-204(b)(2)(A) based on the two Tennessee Attorney General Opinions.

14. In response to the application filed by Kimbrough, the Tennessee Wine and Spirits Retailers Association ("TWRA"), a trade organization whose members include retail liquor store owners, threatened to file a lawsuit against the Commission if the Commission granted Kimbrough's application and the application of another applicant—Defendant Total Wine Spirits Been & More.

15. Upon information and belief, the threat of a lawsuit by TWRA is the sole reason that the Commission refuses to consider and has failed to grant Kimbrough's application.

16. Based on the facts stated herein, Kimbrough is likely to prevail on the merits of this case at a final hearing.

17. Mr. Ketchum terminated his employment in Utah, and he moved to Tennessee based upon his intent to operate the Store. To date, Mr. Ketchum has not been able to obtain comparable full-time employment.

18. The Commission's failure to grant Kimbrough a license has caused, and will continue to cause, a hardship on the Ketchums, specifically in regards to providing the care required for their child with special needs.

19. The seller of the Store has extended the time for Kimbrough to purchase the Store because of the Commission's actions.

20. Recently, the seller has indicated that if the license from the Commission is not issued in the very near future, the seller intends to commence marketing the Store to other potential buyers.

21. Unless this Court enjoins the Commission from enforcing the unconstitutional residency requirements in Tennessee Code Annotated section 57-3-204(b)(2)(A), Kimbrough will suffer immediate and irreparable harm, including, but not limited to, the ability to the loss of the opportunity to purchase the Store.

22. If a preliminary injunction is issued, the Commission will suffer no irreparable harm as the Commission has previously and routinely granted licenses to persons and entities who did not meet the residency requirements in Tennessee Code Annotated section 57-3-204(b)(2)(A).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, AFFLUERE INVESTMENTS, INC. D/B/A KIMBROUGH FINE WINE AND SPIRITS PRAYS that:

1. Upon hearing in this cause, this Court issue a Preliminary and a Permanent Injunction enjoining the Plaintiff/Counter-Defendant, Clayton Byrd in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission from enforcing the residency requirements set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A);

2. That any injunction issued be issued without the necessity for posting of bond or other security; and

3. That this Court grant any other further relief to which Kimbrough may be entitled.

Dated: January 30, 2017.

Respectfully submitted,

/s/Keith C. Dennen
Keith C. Dennen, #012618
FARRIS BOBANGO, PLC
Bank of America Building
414 Union Street, Suite 1105
Nashville, Tennessee 37219
Telephone: (615) 726-1200
Facsimile: (615) 726-1776
E-Mail: kdennen@farris-law.com

Attorneys for Defendant/Counter-Plaintiff, Affluere Investments, Inc. d/b/a Kimbrough Fine Wine and Spirits

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE	**Case No. 3:16-cv-02738**
	Judge Sharp
Plaintiffs,	**Magistrate Judy Frensley**
v.	
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

AMENDED ANSWER OF TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION

The Defendant Tennessee Wine and Spirits Retailers Association (the "Association") answers the Complaint for Declaratory Judgment as follows:

1. Admitted.

2. Admitted.

3. Denied. The Association denies that "Kimbrough Fine Wine & Spirits" is a legal entity. The Association

avers that Affluere Investments, Inc., is a Tennessee corporation with its principal offices in West Valley City, Utah. Affluere Investments, Inc., made application for a retail package store license under which the corporation claims that it will do business as Kimbrough Fine Wine & Spirits through the transfer of ownership of an existing package store located at the address referenced in Paragraph 3 of the Complaint. In its retail package store license application, Affluere Investments, Inc., identified Doug Ketchum and Mary Ketchum as its members. Upon information and belief, neither Doug Ketchum nor Mary Ketchum have resided in Tennessee for two years preceding the date of the application for a retail package store license filed by Affluere Investments, Inc.

4. Denied. The Association denies that "Total Wine Spirits Beer & More" is a legal entity. The Association avers that Tennessee Fine Wines & Spirits, LLC, is a Tennessee corporation with its principal offices in Bethesda, Maryland. Tennessee Fine Wines & Spirits, LLC, made application for a retail package store license under which the corporation claims that it will do business as Total Wine Spirits Beer & More. In its retail package store license application, Tennessee Fine Wines & Spirits, LLC, identified David J. Trone, Robert L. Trone, and five Trusts as its members. Upon information and belief, none of the members of Tennessee Fine Wine & Spirits, LLC, have resided in Tennessee for two years preceding the date of the application for a retail package store license filed by Tennessee Fine Wine & Spirits, LLC.

5. Jurisdiction is not disputed.

6. Venue is not disputed.

7. Admitted.

8. Admitted.

9. The Association admits that the quoted language from Tenn. Code Ann. § 57-3-204(b)(4) became law in 2014 and provides some legislative explanation of the State's reasoning for its oversight, control and accountability measures for individuals involved in the ownership, management and control of premises used for the retail sale of liquor, spirits and high alcohol content beer.

10. Admitted.

11. The Association lacks sufficient information to admit or deny the allegations of Paragraph 11 of the Complaint.

12. The Association admits that Affluere Investments, Inc., has submitted an application as alleged in Paragraph 12 of the Complaint and admits, upon information and belief, that the principals of Affluere Investments, Inc., do not satisfy the statutory residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

13. The Association admits that Tennessee Fine Wine & Spirits, LLC, has submitted an application as alleged in Paragraph 13 of the Complaint and admits, upon information and belief, that the principals of Tennessee Fine Wine & Spirits, LLC, do not satisfy the statutory residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

14. The Association lacks sufficient information to admit or deny the allegations in Paragraph 14 of the Complaint about what the Commission's staff would

recommend. The Association avers that Tenn. Code Ann. § 57-3-210(d) prohibits the Commission "under any condition" from issuing a retail license to any person who, within ten (10) years preceding application for the license, has been engaged in business alone or with others in violation of the liquor laws, rules or regulations of Tennessee or any other state. The Association avers that on the basis of this prohibition, the Commission is required by law to deny the Tennessee Fine Wine & Spirits, LLC, retail package store license application. In addition, the Association avers that Tenn. Code Ann. § 57-3-204(b)(1)(D) prohibits the Commission from issuing a retail package store license to any individual who is not twenty-one years of age or older. The Association further avers that Tenn. Code Ann. § 57-3-204(b)(1)(G) prohibits the Commission from issuing a retail package store license to any individual who intends to carry on the business authorized by the license as the agent or on behalf of another. The Association avers that the Tennessee Fine Wine & Spirits, LLC, retail package store license application shows on its face that the principals of the LLC include five Trusts, through which Trustees will be carrying on the business authorized by the license as agents for the Trust beneficiaries. The Association further avers, on information and belief, that the beneficiary of one of those Trusts is a minor under the age of twenty-one. The Association avers that on the basis of these prohibitions, the Commission's staff is bound to recommend denial of the Tennessee Fine Wine & Spirits, LLC, retail package store license application.

15. Admitted upon information and belief.

16. Admitted.

17. Denied. The Association admits that Kurtis J. Winstead, general counsel for the Association, speculated that litigation was likely whether the Commission granted or denied the Tennessee Fine Wine & Spirits, LLC, retail package store license application. To the extent that the Plaintiff alleges that Winstead's speculation was an assurance or threat of litigation, the allegation is denied.

18. The Association lacks sufficient information to admit or deny the allegations of Paragraph 18 of the Complaint.

19. Denied. The Tennessee General Assembly has plenary power over the subject of sale and distribution of alcoholic beverages. *Metro Gov't of Nashville and Davidson County v. Shacklett*, 554 S.W.2d 601, 607 (Tenn. 1977). The Commission, an office of the Executive branch of state government, cannot exercise power belonging to the Legislative branch of government. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975). Only a Court can declare a statute unconstitutional. *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 538 (Tenn. 2004). Neither a threat of litigation by a license applicant nor an Attorney General's opinion excuse the Commission and its staff from following state law.

20. Denied.

21. The Association adopts and incorporates by references its responses to Paragraphs 1-20 of the Complaint.

22. The Association lacks sufficient information to admit or deny that such a controversy exists with regard to the Affluere Investments, Inc. The Association denies that such a controversy exists with

regard to Tennessee Fine Wine & Spirits, LLC, because there are other independent grounds upon which the Commission is required by law to deny the Tennessee Fine Wine & Spirits, LLC, retail package store license application, making a judicial decision about the constitutionality of Tenn. Code Ann. § 57-3-204(b)(2)(A) unnecessary.

23. The Association lacks sufficient information to admit or deny the allegations of Paragraph 23 of the Complaint.

24. Denied.

25. With respect to the Affluere Investments, Inc., the Association lacks sufficient information to admit or deny the allegations of Paragraph 25 of the Complaint. With respect to Tennessee Fine Wine & Spirits, LLC, the Association avers that there are independent statutory grounds that require denial of the application for a retail package store license for reasons that would not entail litigation over the constitutional issue posed by the Plaintiff in this action, and for that reason the allegations of Paragraph 25 of the Complaint are denied.

26. Undisputed.

27. Denied. The Association avers that as to Tennessee Fine Wine & Spirits, LLC, there are independent statutory grounds that require the Commission to deny the application for a retail package store license regardless of the disposition of the constitutional issue posed by the Plaintiff in this action.

28. All allegations not admitted or otherwise explained are denied.

Additional Defenses:

1. The Plaintiff has failed to join the proper parties.

2. The parties are not properly aligned and should be realigned. The interests of the Plaintiff are aligned with the interests of Affluere Investments, Inc., and Tennessee Fine Wine & Spirits, LLC. Affluere Investments, Inc., and Tennessee Fine Wine & Spirits, LLC, should be realigned as Plaintiffs.

3. The Complaint fails to state a claim upon which relief can be granted as to Tennessee Fine Wine & Spirits, LLC, because there are independent statutory grounds that require denial of the retail package store license application of Tennessee Fine Wine & Spirits, LLC.

4. The Court should abstain from deciding the constitutional issue posed by the Complaint unnecessarily if other grounds exist, besides the statute whose constitutionality is in question, that require denial of the retail package store license applications of the Affluere Investments, Inc., and Tennessee Fine Wine & Spirits, LLC.

5. **One or more of the Plaintiffs lacks standing.**

Respectfully submitted,
/s/ Richard L. Colbert

Richard L. Colbert, #9397
John J. Griffin, Jr., #15446
Nina M. Eiler, #33457
KAY, GRIFFIN, ENKEMA &
COLBERT, PLLC
222 Second Avenue North, Suite 340-M
Nashville, TN 37201
(615) 742-4800
rcolbert@kaygriffin.com

john.griffin@kaygriffin.com
neiler@kaygriffin.com
Attorneys for Defendant, Tennessee Wine and Spirits Retailers Association

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE	**Case No. 3:16-cv-02738**
Plaintiffs,	**Judge Sharp**
v.	**Magistrate Judge Frensley**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

DEFENDANT'S RESPONSE TO PLAINTIFF TENNESSEE FINE WINE & SPIRITS, LLC'S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

The Defendant Tennessee Wine and Spirits Retailers Association ("Association") submits the following responses to Plaintiff Tennessee Fine Wine

& Spirits, LLC's ("Total Wine") statement of facts in support of its motion for partial summary judgment [ECF Doc. No. 55-2].

1. The Tennessee Alcoholic Beverage Commission ("ABC") is a Tennessee state agency whose duty is to license the sale and delivery of alcoholic beverages. (Complaint for Declaratory Judgment, DE # 1-1 ["Compl."], at ¶ 1.)

Response: Undisputed.

2. Plaintiff Clayton Byrd is the ABC's Executive Director. (Compl. at ¶ 1.)

Response: Undisputed.

3. Tennessee Fine Wines is a limited liability company created under Tennessee law on November 6, 2015. (Declaration of Edward Cooper ["Cooper Dec."] at ¶ 4.

Response: Undisputed.

4. The members of Tennessee Fine Wines are not Tennessee residents. (Cooper Dec. at ¶ 5.)

Response: Undisputed.

5. Tennessee Fine Wines seeks to own and operate one or more retail liquor stores (referred to as "retail package stores") in Tennessee. (Cooper Dec. at ¶ 3.)

Response: Undisputed.

6. On July 5, 2016, Tennessee Fine Wine filed an application with ABC for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application"). (Cooper Dec. at ¶ 6.)

Response: Undisputed.

7. Before filing the Application, Tennessee Fine Wine's representatives met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license.

Response: Disputed — Director Byrd did not meet with representatives of Total Wine prior to the submission of Total Wine's application. [ECF Doc. No. 73-1, ¶ 7]. Furthermore, the Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

8. Those discussions included whether the Residency Requirements would preclude Tennessee Fine Wines from obtaining a license. (Cooper Dec. at ¶ 8.)

Response: Disputed — Director Byrd did not meet with representatives of Total Wine prior to the submission of Total Wine's application. [ECF Doc. No. 73-1, ¶ 8]. Furthermore, the Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

9. The ABC's staff advised Tennessee Fine Wine's representatives that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. (Cooper Dec. at ¶ 9.)

Response: Disputed to the extent that Director Byrd was not a party to these discussions [ECF Doc. No. 73-1, ¶ 9]. Furthermore, the Association

objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

10. The ABC's staff stated that the ABC had licensed other non-residents based on those opinions. (Cooper Dec. at ¶ 9.)

Response: Undisputed for purposes of summary judgment only. The Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

11. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee. (Cooper Dec. at ¶ 10.)

Response: Undisputed for purposes of summary judgment only. The Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

12. The ABC was scheduled to vote on the Application at its August 23, 2016, meeting; however, the ABC voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements. (Compl. at ¶ 15; Cooper Dec. at ¶ 13.)

Response: Undisputed.

13. Mr. Byrd filed this action in the Chancery Court for Davidson County, Tennessee on September 21, 2016 (*See* Compl. at p. 1).

Response: Undisputed.

14. At its September 29, 2016 meeting the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action. (Cooper Dec. at ¶ 15.)

Response: Undisputed.

Respectfully submitted,

/s/ Richard L. Colbert
Richard L. Colbert, #9397
John J. Griffin, Jr., #15446
Nina M. Eiler, #33457
KAY, GRIFFIN, ENKEMA &
COLBERT, PLLC
222 Second Avenue North, Suite 340-M
Nashville, TN 37201
(615) 742-4800
rcolbert@kaygriffin.com
john.griffin@kaygriffin.com
neiler@kaygriffin.com
Attorneys for Defendant, Tennessee Wine and Spirits Retailers Association

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

NOTICE OF FILING

Tennessee Fine Wines & Spirits, LLC ("Tennessee Fine Wines") hereby gives notice of the filing of the declaration of W. Justin Adams attached hereto as **Exhibit 1**. Tennessee Fine Wines is filing this declaration in further support of paragraphs 9 and 10 of its statement of facts regarding its motion for partial summary judgment. (*See* Dkt. #55-2 at ¶¶ 9–10.)

Respectfully submitted:

BONE MCALLESTER NORTON PLLC
/s/ Edward M. Yarbrough (TN BPR # 004097)
/s/ J. Alex Little (TN BPR # 029858)
/s/ W. Justin Adams (TN BPR # 022433)
511 Union Street, Suite 1600
Nashville, Tennessee 37219

Telephone: 615-238-6300
Facsimile: 615-238-6301
eyarbrough@bonelaw.com
alex.little@bonelaw.com
wjadams@bonelaw.com

HOWELL & FISHER, PLLC

/s/ Darrell G. Townsend (TN BPR # 005460)
300 James Robertson Parkway
Nashville, Tennessee 37201
Telephone: 615-244-3370
Facsimile: 615-244-3518
dtownsend@howell-fisher.com

Counsel for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

DECLARATION OF W. JUSTIN ADAMS IN SUPPORT OF TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, W. Justin Adams, make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am an adult and have personal knowledge of the matters stated in this declaration.

2. I am an attorney with the law firm of Bone McAllester Norton PLLC in Nashville, Tennessee. I am one of the counsel of record for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More ("Tennessee Fine Wines") in this case.

3. On March 10, 2017, I sent a public records request to the Tennessee Alcoholic Beverage Commission by a letter to the Commission's legal counsel, Joshua Stepp. Request No. 5 in my letter sought "[a]ny records of the Tennessee Alcoholic Beverage Commission granting a retail package store license application submitted by an applicant who did not comply with the Residency Requirements [Tenn. Code Ann. § 57-3-04(b)(2)(A) or Tenn. Code Ann. § 57-3-204(b)(3)(A)]" from June 6, 2012, to the present. Request No. 6 in my letter sought "[a]ny records of the Tennessee Alcoholic Beverage Commission denying a retail package store license application on the ground that the applicant did not comply with the Residency Requirements" from June 6, 2012, to the present.

4. On March 16, 2017, I received a letter from Mr. Stepp in response to my request, a copy of which is attached as **Exhibit 1**. Regarding Items 5 and 6 of my request, Mr. Stepp stated as follows:

> Please be advised, however, that shortly after the issuance of the 2012 Attorney General Opinion [Tenn. Op. Att'y Gen. No. 12-59 (June 6, 2012)], the Commission did not consider the Residency Requirements in determining whether to grant or deny an application for a license. Thus, the Commission does not have any records responsive to Request Nos. 5 and 6, because the Commission made no determination as to whether an applicant complied with the Residency Requirements in determining whether to grant or deny a license, and the Residency Requirements were not considered in granting or denying an application.

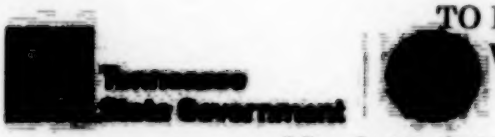
Exhibit 2 at pp. 2–3.

5. It therefore appears that the Commission deviated from its previous policy of not considering the Residency Requirements when the Commission deferred action on Tennessee Fine Wines' application for a retail package store license on August 23 and September 29, 2016. This change in policy occurred without any prior notice.

I declare under penalty of perjury that the foregoing is true and correct.

/s/W. Justin Adams
W. Justin Adams
4/12/17
Date

EXHIBIT 1
TO DECLARATION OF
W. JUSTIN ADAMS



March 16, 2017

W. Justin Adams
Bone McAllester Norton PLLC
Nashville City Center, Suite 1600
511 Union Street
Nashville, TN 37219
RE: Public Records Request

Dear Mr. Adams:

On March 10, 2017, the Tennessee Alcoholic Beverage Commission received your letter clarifying your request for copies of the following records for the time period of June 6, 2012, to the present, pursuant to the Tennessee Public Records Act:

1. Any e-mails, letters, reports, memoranda, or other documents referring to the opinions of the Tennessee Attorney General expressed in Tenn. Op. Att'y Gen. No. 12-59 (June 6, 2012) or Tenn. Op. Att'y Gen. No. 14-83 (Sept. 12, 2014).

2. Any e-mails, letters, reports, memoranda, or other documents referring to the opinion of the United States Court of Appeals for the Sixth Circuit in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008).

3. Any e-mails, letters, reports, memoranda, or other documents referring to the constitutionality or enforceability of Tenn. Code Ann. § 57-3-204(b)(2)(A) or Tenn. Code Ann. § 57-3-204(b)(3)(A) (the "Residency Requirements").

4. Any e-mails, letters, reports, memoranda, or other documents referring to the Residency Requirements' applicability to or effect on a particular retail package store license application.

5. Any records of the Tennessee Alcoholic Beverage Commission granting a retail package store license application submitted by an applicant who did not comply with the Residency Requirements.

6. Any records of the Tennessee Alcoholic Beverage Commission denying a retail package store license application on the ground that the applicant did not comply with the Residency Requirements.

Tenn. Code Ann. § 10-7-503(a) provides the following:

(2)(B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the records to be promptly available for inspection, the custodian shall within seven (7) business days:

(i) Make such information available to the requestor;

(ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or

(iii) *Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce such record or information.* (emphasis added.)

The Commission is in the process of searching for, retrieving, reviewing, and redacting, if necessary, all records responsive to your request. Please be advised, however, that shortly after the issuance of the 2012 Attorney General Opinion, the Commission did not consider the Residency Requirements in determining whether to grant or deny an application for a license. Thus, the Commission does not have any records responsive to Request Nos. 5 and 6, because the Commission made no determination as to whether an applicant complied with the Residency Requirements in determining whether to grant or deny a license, and the Residency Requirements were not considered in granting or denying an application.

The only records that the Commission may have are the records of applicants with an out-of-state address within 2 years prior to application who were granted a retail package store license. However, in order to provide copies of these records, the Commission will have to physically search through approximately 600+ files to determine first if an applicant was granted a license and then if the applicant has an out-of-state address within 2 years prior to application. Approximately half of these files are active and the Commission estimates that it will take between 10-30 minutes per file to retrieve the files, make this determination, and make copies of any records. The remaining files are closed and in storage and the Commission estimates that it will take significantly longer to retrieve those files and then search and determine if they have any responsive records. In total, the Commission estimates that it will take between 205 and 470 hours to produce copies of the records of applicants with an out-of-state address who

were granted a retail package store license since June 6, 2012.

Please advise as to whether you still want the Commission to produce copies of these records. If so, given the breadth and scope of your request, the Commission will need to produce these records in installments. The Commission estimates that the first installment will be available March 31, 2017. We will provide you an estimate of the cost for producing that first installment prior to that date.

Sincerely,

s/Joshua F. Stepp

Joshua Stepp
Commission Counsel
Tennessee Alcoholic Beverage Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,	
Plaintiffs,	**Case No. 3:16-cv-02738**
V.	**Judge Sharp**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

ORDER

For the reasons set forth in the Memorandum filed contemporaneously herewith, Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, (Docket No. 55), is hereby GRANTED. The Court declares the residency requirements under Tenn. Code Ann. § 57-3-204 unconstitutional and enjoins their enforcement.

This order shall constitute the judgment in this case pursuant to Fed. R. Civ. P. 58.

It is SO ORDERED.

/s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,	)	**Case No. 3:16-cv-02738**
Plaintiffs,	)	**Judge Sharp**
V.	)	
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	)	
Defendant.	)	

ORDER

Pending before the Court are the following motions: Plaintiff Affluere Investments, Inc.'s (d/b/a/ Kimbrough Fine Wine & Spirits) ("Affluere") Motion for Preliminary Injunction, (Docket No. 63); Plaintiff Clayton Byrd's ("Byrd") Motion for Protective Order, (Docket No. 81); and Plaintiff Byrd's Motion to Dismiss Plaintiff Affluere's Counterclaim for Injunctive Relief, (Docket No. 87).

Because the Court has granted Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, Plaintiff Affluere's Motion for Preliminary Injunction, (Docket No. 63), and Plaintiff Byrd's Motion to Dismiss, (Docket No. 87), are hereby

DENIED AS MOOT. Likewise, the Court hereby DENIES AS MOOT Plaintiff Byrd's Motion for Protective Order, (Docket No. 81).

It is SO ORDERED.

s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Ave. North,
Suite 340-M
Nashville, TN 37201

Benjamin M. Flowers
JONES DAY
325 John H. McConnell
Blvd., Suite 600
Columbus, OH 43215

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Tennessee Wine and Spirits Retailers Association. Petitioner is not the subsidiary or affiliate of any publicly owned corporation. No publicly owned corporation owns 10% or more of Petitioner's stock.

Respondents are Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More; and Affluere Investments, Inc., d/b/a Kimbrough Fine Wine & Spirits.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 5

STATEMENT 7

SUMMARY OF ARGUMENT 17

ARGUMENT 23

I. TENNESSEE'S DURATIONAL-RESIDENCY REQUIREMENT IS CONSTITUTIONAL 23

A. The Twenty-first Amendment makes the dormant Commerce Clause inapplicable to most state laws regulating liquor distribution 24

1. Pre-Prohibition regulation of alcohol 25

2. Prohibition and repeal 28

3. Post-repeal legislation 32

TABLE OF CONTENTS
(continued)

Page

B. Precedent establishes that the dormant Commerce Clause does not apply to "core" exercises of Twenty-first Amendment authority 37

C. Tennessee's two-year durational requirement is constitutional 44

II. THE DECISION BELOW WAS WRONG 52

CONCLUSION 56

TABLE OF AUTHORITIES

Page(s)

CASES

324 Liquor Corp. v. Duffy,
479 U.S. 335 (1987) 30

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 30, 39, 51

Arizona v. Inter Tribal Council of Arizona, Inc.,
570 U.S. 1 (2013) 46

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009) 45, 46

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) ..... *passim*

Bond v. United States,
131 S.Ct. 2355 (2011) 31

Brooks v. Vassar,
462 F.3d 341 (4th Cir. 2006) 45

Brown-Forman Distillers Corp., v. New York State Liquor Auth.,
476 U.S. 573 (1986) 40

California v. LaRue,
409 U.S. 109 (1972) 39, 40, 41, 47

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 36, 38

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) ..... *passim*

Carter v. Virginia,
321 U.S. 131 (1944) 43

TABLE OF AUTHORITIES
(continued)

Page(s)

Cooper v. Tex. Alcoholic Beverage Comm'n,
820 F.3d 730 (5th Cir. 2016) 55

Duckworth v. Arkansas,
314 U.S. 390 (1941) 25, 44

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

Gregory v. Ashcroft,
501 U.S. 452 (1991) 31

Healy v. Beer Inst.,
491 U.S. 324 (1989) 20, 40, 41

Heublein, Inc. v. South Carolina Tax Comm'n,
409 U.S 275 (1972) 20, 38, 39, 41

Hinebaugh v. James,
192 S.E. 177 (W.V. 1937) ..... *passim*

Hostetter v. Idlewild Bon Voyage Liquor Corp.,
377 U.S. 324 (1963) 20, 22, 37, 39

James Clark Distilling Co. v. W. Maryland R. Co.,
242 U.S. 311 (1917) 28, 30

Leisy v. Hardin,
135 U.S. 100 (1890) 26, 30

The License Cases,
46 U.S. (5 How.) 504 (1847) 25, 51

Lochner v. New York,
198 U.S. 45 (1905) 52

TABLE OF AUTHORITIES
(continued)

Page(s)

Loretto Winery Ltd. v. Gazzara,
601 F. Supp. 850 (S.D.N.Y. 1985) 8, 28

Maine v. Taylor,
477 U.S. 131 (1986) 25

Maxwell's Pic-Pac, Inc. v. Dehner,
739 F.3d 936 (6th Cir. 2014) 8, 29

McCulloch v. Maryland,
17 U.S. 316 (1819) 46

Mugler v. Kansas,
123 U.S. 623 (1887) 25

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 5, 31

North Dakota v. United States,
495 U.S. 423 (1990) ..... *passim*

Oregon v. Ice,
555 U.S. 160 (2009) 31

Premier-Pabst Sales Co. v. Grosscup,
298 U.S. 226 (1936) 35

Rhodes v. Iowa,
170 U.S. 412 (1898) 7, 27

S. Wine & Spirits v. Div. of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) ..... *passim*

State Bd. of Equalization of Cal. v. Young's Market Co.,
299 U.S 59 (1936) 19, 37

TABLE OF AUTHORITIES
(continued)

Page(s)

Town of Greece v. Galloway,
572 U.S. 565 (2014) 32

Vance v. W.A. Vandercook Co.,
170 U.S. 438 (1898) 18, 27, 35

Walling v. Michigan,
116 U.S. 446 (1886) 26

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 19, 24, 37, 55

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. XVIII 8, 28

U.S. Const. amend. XXI ..... *passim*

U.S. Const. art. I, § 8 ..... 1, 25

U.S. Const. art. II, § 1 49

Webb-Kenyon Act, 27 U.S.C. § 122 ..... 28, 29

Wilson Act, 26 Stat. 313 Ch. 728
(codified at 27 U.S.C. § 121) 26

28 U.S.C. § 44 49

28 U.S.C. § 1254(1) 1

Ala. Code § 45-32-150.05(3) 49

Ariz. Rev. Stat. Ann. § 1886d
(Supp. 1936) 33

Cal. Educ. Code § 68017 46

Cal. Fam. Code § 2320 46

Colo. Rev. Stat. Ann., ch. 89, § 4 (1935) 33, 34

1937 Ga. Laws 103 § 24 ..... 10, 34

TABLE OF AUTHORITIES
(continued)

Page(s)

Idaho Code Ann. § 18-130 (Supp. 1940) 33, 34
Ill. Liquor Control Act of 1934, art. VI 33
Ind. Code § 8323e (1914) 27
Iowa Code § 1921.019(1) (1939) 33, 34
Ky. Rev. Stat. § 243.100(3) (1942) 10, 33, 34
Manhattan, Kansas Code of Ordinances § 5-68 49
1933 Mass. Acts. 753 § 15 33
McDonough, Georgia Code of Ordinances, Tit. 5, ch. 5.40.030(A)(b) 49
1 Md. Code Ann., art. 2B, § 13(4) (1939) 33, 34
Me. Const. art. V, Pt. 1, § 4 49
Mich. Comp. Laws § 9209-29 (Supp. 1935) 33
1 Mo. Rev. Stat. § 4906 (1939) 33
Mo. Stat. § 542.190 49
N.C. Gen. Stat. § 3411 (1939) 10, 33, 34
N.D. Rev. Code § 5-0202 (1943) 34
N.J. Rev. Stat. § 33:1-25 (1937) 10, 33, 34, 35
Neb. Comp. Stat. § 53-328 (1929 & Supp. 1941) 33
Neb. Stat. Rev. § 3844 (1913) 27
Ohio Rev. Code. Ann. § 6064-17 (1936) .. 10, 33, 34, 35
R.I. Gen. Laws, ch. 123, § 2 (1909) 27

TABLE OF AUTHORITIES
(continued)

Page(s)

20 R.I. Gen. Laws Ann., ch. 163, § 4 (1938) 33

Tenn. Code Ann. § 57-3-204 ..... *passim*

Tenn. Code Ann. § 57-3-208 48

1939 Tenn. Pub. Acts, ch. 49, §§ 5–8 ..... 11, 33, 34

Tex. Const. art. III, § 6 49

Tex. Rev. Civ. Stat., art. 7446 (1911) 27

Vt. Stat. Ann. tit. 28, ch. 271, § 6156 (1947) 10, 33, 34

Wis. Stat. § 176.05(9) (1937) 10, 33, 34, 35

Wyo Comp. Stat. § 53-204 (1945) 10, 33, 34, 35

OTHER AUTHORITIES

Richard A. Epstein, THE CLASSICAL LIBERAL CONSTITUTION (Harv. Univ. Press 2014) 29

Raymond B. Fosdick & Albert L. Scott, TOWARD LIQUOR CONTROL (Harper & Bros. 1933) 31

Richard F. Hamm, SHAPING THE EIGHTEENTH AMENDMENT (1995) 8

Leonard V. Harrison & Elizabeth Laine, AFTER REPEAL (Harper & Bros. 1936) 9, 33

K. Austin Kerr, ORGANIZED FOR PROHIBITION (Yale Univ. Press 1985) 8, 51

TABLE OF AUTHORITIES
(continued)

Page(s)

Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages, in* Social and Economic Control of Alcohol: The 21st Amendment in the 21st Century (Carole L. Jurkiewicz & Murphy J. Painter, eds., 2008) 9, 11, 51

Harry G. Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, Contemp. Drug Probs., Spring 1985 ..... 9, 32

Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145 (1959) 10, 19, 33, 34

Thomas R. Pegram, BATTLING DEMON RUM (Ivan R. Dee 1998) ..... *passim*

W. J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 Yale J.L. & Human. 285 (1996) 8

Robert H. Skilton, *State Power Under the Twenty-First Amendment*, 7 Brook. L. Rev. 342 (1938) 9, 10, 32, 33

Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018) 47

TABLE OF AUTHORITIES
(continued)

Page(s)

George Washington Letter to
Thomas Green (Mar. 31, 1789).....5

Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*,
13 Va. J. Soc. Pol'y & L. 552 (2006).....18, 30

OPINIONS BELOW

The District Court's opinion granting summary judgment to Respondent Tennessee Fine Wines (Pet.App. 57a–81a) is published at 259 F. Supp. 3d 785 (M.D. Tenn. 2017). The Sixth Circuit's divided decision affirming that judgment (Pet.App. 1a–56a) is published at 883 F.3d 608 (6th Cir. 2018).

JURISDICTION

The Sixth Circuit entered judgment on February 21, 2018. On April 26, 2018, Justice Kagan extended the time to file a petition for certiorari to and including July 21, 2018. No. 17A1186. On July 20, 2018, Petitioner filed its petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Twenty-first Amendment of the United States Constitution provides that "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

2. The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

3. Section 57-3-204(b) of the Tennessee Code Annotated, which addresses the issuance of licenses for the retail sale of alcoholic beverages, provides, in relevant part:

(2) No retail license under this section may be issued or transferred to or held by, to any individual:

(A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years;

. . .

(3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to, transferred to, or maintained by any corporation unless such corporation meets the following requirements:

(A) No retail license shall be issued to, transferred to, or maintained by any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;

(B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of

the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;

. . .

(D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

(4) It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the com-

> mission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D), (4).

INTRODUCTION

The debate about alcohol's place in society is as old as the country. The first president once denounced alcohol as "the source of all evil—and the ruin of half the workmen in this Country." George Washington, Letter to Thomas Green (Mar. 31, 1789). The second "enjoyed a tankard of hard cider with his breakfast every morning." Thomas R. Pegram, BATTLING DEMON RUM 8 (Ivan R. Dee 1998). Other Americans have seen the glass half-empty *and* half-full. The same F. Scott Fitzgerald who is said to have toasted, "Here's to alcohol, the rose colored glasses of life," is also credited with noting, more soberly: "First you take a drink, then the drink takes a drink, then the drink takes you."

The controversy persists because alcohol is not an ordinary article of commerce—it is both widely enjoyed and dangerously misused. What do you do with something like that? Centuries of experience confirm that there is no right answer; every approach, ranging from *laissez faire* to absolute prohibition, comes with tradeoffs. Weighing them necessarily depends on difficult value judgments and conditions that vary from time to time and place to place.

Because striking the right balance requires appreciation of regional factors, it makes sense to leave the regulation of alcohol to state and local officials. After all, those closest to a community are best positioned to understand its needs. In general, that is precisely what our Constitution does. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New*

State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Constitution enshrines the difference between alcohol and ordinary articles of commerce—and guarantees states the opportunity to experiment with alcohol regulation—in the Twenty-first Amendment. Section 2 of the Amendment prohibits "[t]he transportation or importation" of "intoxicating liquors" into any state "for delivery or use therein . . . in violation of the laws thereof." This section "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts"—two pre-Prohibition laws, still on the books today, that give the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm v. Heald*, 544 U.S. 460, 484, 488 (2005).

Consistent with that grant of authority—first given by statute, and now enshrined in the Constitution—states are unfettered by the dormant Commerce Clause when they exercise their "core § 2 power": the power "directly to regulate the sale or use of liquor within [their] borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984). Put another way, state laws regulating in-state distribution of alcohol "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489.

This case asks whether Tennessee violated the dormant Commerce Clause by limiting retail liquor licenses to individuals who have resided in Tennessee for the previous two years, and to corporations whose directors and officers satisfy the same requirement.

The principles above answer that question: Because Tennessee's durational-residency requirement regulates in-state distribution and treats "liquor produced out of state the same as its domestic equivalent," it is "protected under the Twenty-first Amendment." The Court should therefore hold that the law is a valid exercise of Tennessee's "core § 2 power" to directly "regulate the sale or use of liquor within its borders," and reverse the Sixth Circuit's contrary ruling.

STATEMENT

The temperance movement emerged in the early-to-mid 1800s. In fits and starts, it promoted sobriety, regulation, and eventually the national prohibition of alcohol. State legislatures and Congress passed numerous laws in response to these efforts, and this Court frequently determined the constitutionality of those laws. This legal history provides context that is critical for understanding the Twenty-first Amendment. This section begins with this historical context, before turning to the procedural history of this case.

1. States experimented with various alcohol-related regulations throughout the 1800s. And this Court's cases addressing those experiments reveal the uneasy consensus that had emerged by the turn of the century. On the one hand, the states could regulate alcohol sales ***within their borders***, at least so long as they did not discriminate against alcohol produced out of state. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898). On the other hand, the states could not regulate the sale or transportation of liquor ***across state lines***; the Commerce Clause left that task to the federal government alone. *Id.* at 424.

This division of authority posed a serious problem from the temperance movement's perspective. Laws banning the in-state sale or consumption of alcohol were of little use if states were powerless to stop cross-border transactions. Congress addressed this concern in 1913 when it passed the Webb-Kenyon Act. That law gave the states almost complete authority to regulate the sale and use of alcohol by making it illegal to transport liquor into a state where its consumption or sale would be illegal. *See* W. J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 Yale J.L. & Human. 285, 291–92 (1996) (reviewing Richard F. Hamm, SHAPING THE EIGHTEENTH AMENDMENT (1995)).

The temperance movement wanted more: a complete, nationwide prohibition of alcohol sales. *See id.* at 292; K. Austin Kerr, ORGANIZED FOR PROHIBITION 139–41 (Yale Univ. Press 1985). It succeeded on January 16, 1919, when the states ratified the Eighteenth Amendment, prohibiting "the manufacture, sale, or transportation of intoxicating liquors within," and "the importation thereof into . . . the United States." U.S. Const. amend. XVIII, § 1.

Prohibition was supposed to end the use of alcohol and curb its attendant social ills. It didn't. Instead, the public became all the more "intrigued with alcohol and drinking because the sale of booze was forbidden." *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 855 (S.D.N.Y. 1985). And the lack of a lawful distribution channel "spawned a violent and unruly organized crime industry to satisfy appetites for alcohol." *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 939 (6th Cir. 2014). The result was unsustainable. *See Loretto*, 601 F.Supp. at 856.

So, in 1933, the American people met in state conventions and ratified the Twenty-first Amendment. The Amendment's first section ended Prohibition by repealing the Eighteenth Amendment. Its second section vested authority to regulate alcohol in the states, prohibiting the "transportation or importation into any State, . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof."

The vast majority of states responded by legalizing the sale and use of alcohol to some degree. *See* Robert H. Skilton, *State Power Under the Twenty-First Amendment*, 7 Brook. L. Rev. 342, 345 & n.14 (1938). But the concern for public safety remained, especially given the "huge, sprawling, and illegal industry for producing and distributing alcoholic beverages" that "already existed." Harry G. Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, Contemp. Drug Probs., Spring 1985, 63, available at https://tinyurl.com/ybdbzphs. The states that legalized alcohol thus assumed the "responsibility to render tolerable, if not entirely harmless, the newly restored commerce in these potentially dangerous commodities." Leonard V. Harrison & Elizabeth Laine, AFTER REPEAL 42 (Harper & Bros. 1936).

Most states tried to manage these problems through "three-tier systems." These systems divided the industry into producer, wholesaler, and retailer levels, and required that all consumer sales pass through this distribution chain. Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* Social and Economic Control of Alcohol: The 21st Amendment in the 21st Century 31, 33–34 (Carole L. Jurkiewicz & Murphy J.

Painter, eds., 2008). The states then separately licensed participants at each level.

When it came to retailers, these licensing requirements "strictly circumscrib[ed] the ability of private interests to sell and distribute liquor within state borders." *Granholm*, 544 U.S. at 517 (Thomas, J., dissenting); Skilton, 7 Brook. L. Rev. at 349–50. For example, many states "limit[ed] the issuance of retail . . . licenses to residents of the state or to domestic corporations." Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959).

In addition to allowing only residents to sell alcohol, states often required "a fixed period of prior residence." *Id.*; *see, e.g.*, 1937 Ga. Laws 103 § 24; Ky. Rev. Stat. § 243.100(3) (1942); N.C. Gen. Stat. § 3411(103)(1½) (1939); N.J. Rev. Stat. § 33:1-25 (1937); Ohio Rev. Code. Ann. § 6064-17 (1936); Vt. Stat. Ann. tit. 28, ch. 271, § 6156 (1947); Wis. Stat. § 176.05(9) (1937); Wyo. Comp. Stat. § 53-204 (1945). These requirements provided states a genuine "opportunity to determine [a license applicant's] fitness," and created "a bar against undesirable nonresidents coming into the state for the sole purpose of" selling alcohol. *Hinebaugh v. James*, 192 S.E. 177, 178 (W.V. 1937). These laws also ensured that each applicant was and would remain "amenable to the direct process of state courts." *Id.*

The states' licensing of wholesalers served a related but distinct purpose. In the years before Prohibition, brewers took control of local saloons, setting them up in exchange for a fee and the promise to sell only their beers. Pegram, BATTLING DEMON RUM at

94–95. This "tied-house system" resulted in an abundance of saloons that competed hard for profits—driving down prices and encouraging saloonkeepers to promote overconsumption and illegal use. *Id.* at 96–97; Kerr, ORGANIZED FOR PROHIBITION at 23–24. The three-tier system helped prevent this by "interposing a wholesaler level between the supplier and retailer." Lawson, *The Future of the Three-Tiered System* at 33. "The wholesaler was intended to be a local, almost exclusively family-owned business that would spend years and a great deal of capital developing its business," giving it "a strong incentive to avoid regulatory sanctions" and to be seen as a "good corporate citizen[]." *Id.* This introduced a second local actor (in addition to the retailer) between the consumer and the producer, whose concern for the community would further tame "the forces that promote intemperance." *Id.* at 31.

2. In 1939, Tennessee legalized the sale of alcohol. The same bill created a three-tier system with retailers subject to a two-year residency requirement. 1939 Tenn. Pub. Acts, ch. 49, §§ 5–8.

The state legislature has amended the licensing law many times since, but the two-year residency requirement remains. Under § 57-3-204(b)(2)(A) of the Tennessee Code, "[n]o retail license . . . may be issued . . . to any individual . . . [w]ho has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made." Corporate entities cannot obtain a license "if any officer, director, or stockholder owning any capital stock in the corporation" fails the requirements applicable to individuals. *Id.* § 57-3-204(b)(3)(A). The legislature later codified its reasons

for these requirements: Because it is important to "maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of" licensed retailers, "it is in the best interest of the health, safety and welfare of [Tennessee] to require all licensees to be residents." *Id.* at § 57-3-204(b)(4).

3. Petitioner, Tennessee Wine and Spirits Retailers Association, represents Tennessee liquor retailers. In 2016, it learned that a business with an out-of-state address—Respondent Tennessee Fine Wines and Spirits, LLC, which refers to itself as "Total Wine"—had applied for a retail liquor license. Because Total Wine did not satisfy Tennessee's durational-residency requirement, the Association notified the State that the application should be denied. Pet.App.3a–4a.

Fearing litigation, Tennessee filed a state-court declaratory-judgment action in the name of Clayton Byrd (the Executive Director of the state liquor licensing commission) against the Association, Total Wine, and another applicant with out-of-state owners, Affluere Investments, Inc. Pet.App.4a. Byrd asked the court to resolve whether the Twenty-first Amendment allowed Tennessee to enforce its durational-residency law, despite any dormant Commerce Clause problems that such a law might otherwise create. Pet.App.4a.

The Association removed the case to federal court and, along with Tennessee, defended the law. Pet.App.4a & n.1. Tennessee and the Association argued (among other things) that the durational-residency requirement comported with this Court's Twenty-first Amendment precedents, including its latest: *Granholm v. Heald*, 544 U.S. 460. That case

invalidated state laws allowing only in-state producers—as opposed to out-of-state producers—to sell wine directly to consumers. *Id.* at 493. But in reaching this holding, the Court recognized that three-tier systems are "unquestionably legitimate" under the Twenty-first Amendment, which "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality op.)). Tennessee and the Association argued that because Tennessee's three-tier scheme "treat[s] liquor produced out of state the same as its domestic equivalent," that scheme—including its key durational-residency requirement—is "protected under the Twenty-first Amendment." *Id.* at 489.

The District Court struck down the law. It first dismissed the relevant language in *Granholm* as "dicta." Pet.App.65a. While the court acknowledged the constitutionality of three-tier systems in the abstract, it read *Granholm* to mean that, although the dormant Commerce Clause applies "to a lesser extent" to laws that "deal with the retailer or wholesaler tier," "[d]istinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system." Pet.App.70a–71a, 73a. Because the District Court believed that Tennessee's two-year durational-residency requirement was insufficiently "inherent" in that system, it concluded that the requirement could not be justified by the Twenty-first Amendment. Pet.App.73a–76a.

The District Court also held unconstitutional, on identical grounds, two other aspects of the Tennessee

law. First, it struck down a provision authorizing license renewals only for individuals who have been residents for ten years. Second, it struck down the requirement that all directors, officers, and stockholders of a corporate applicant satisfy the two-year residency requirement for initial applications and the ten-year requirement for renewals. Pet.App.29a–33a.

4. A divided panel of the Sixth Circuit affirmed. The majority concluded that, even though *Granholm*'s inquiry focused on out-of-state liquor, the decision is better understood as an application of traditional dormant Commerce Clause principles, which forbid discrimination against out-of-state economic interests generally. Pet.App.17a–23a. And since Tennessee's durational-residency law treats out-of-state economic interests differently from in-state economic interests, the court applied traditional dormant Commerce Clause scrutiny. Tennessee's law failed that test, in the majority's view, because the state could have pursued its interests in promoting the public welfare through less discriminatory means. *See* Pet.App.29a–33a (suggesting the state could impose residency requirements just on retailers' "general manager[s]," require "both in-state and out-of-state retailers to post a substantial bond," or require "public meetings" before issuing a license).

Judge Sutton dissented in relevant part, concluding that the two-year durational-residency requirement passed muster under the Twenty-first Amendment. "The language of the amendment—prohibiting the 'delivery or use' of alcohol 'in violation of the laws' of each State—empowers States to regulate sales of alcohol within their borders." Pet.App.41a. In 1933, when Americans ratified the Amendment, this would

have been understood to permit regulation of purely in-state sales without regard to the dormant Commerce Clause. That is because the dormant Commerce Clause limits the states' authority only over *interstate* commerce, and purely in-state commercial conduct was not regarded as interstate commerce at the time of ratification. Pet.App.42a–46a. Thus, laws regulating who could sell alcohol within a state's borders would not have been understood to present any conflict with the dormant Commerce Clause:

> From the vista of 1933, a lawyer (and judge) would have presumed that the regulation of sales of alcohol *within* the state (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power given the existing paradigm of largely separate and exclusive spheres of [state and federal] regulatory power.

Pet.App.44a.

Against this historical "backdrop," Judge Sutton explained, this Court's Twenty-first Amendment precedents are easier to understand. Pet.App.48a. Those cases fall into two rough categories. "On one side" are cases holding that "the Commerce Clause still limits state efforts to regulate activity outside of a State's territorial domain." Pet.App.48a. "On the other side," "exceptions to the normal operation of the Commerce Clause remain alive and well in some areas," including for in-state "alcohol distribution." Pet.App.49a. In this area, state authority is "'virtually' limitless": "State regulations of in-state distribution, even if facially discriminatory [against out-of-state economic interests], are constitutional unless a challenger can show that they serve no purpose besides 'economic

protectionism.'" Pet.App.49a (quoting *Granholm*, 544 U.S. at 488, and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)).

Judge Sutton concluded that Tennessee's two-year durational-residency requirement fell within the latter, constitutionally permissible set of regulations. After all, *Granholm* recognized that three-tier systems are "'unquestionably legitimate,'" and that, "[a]s part of these systems, the States may require retailers and wholesalers to reside within their borders." Pet.App.49a–50a (quoting *Granholm*, 544 U.S. at 489). "And if the States may do that, they must have flexibility to define the requisite degree of in-state presence necessary for participating as a retailer or wholesaler." Pet.App.50a. Judge Sutton went on to explain that, in his view, states cannot exercise that flexibility for purely protectionist ends. But durational-residency requirements for retailers advance state interests in responsible alcohol consumption: Retailers "are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking,'" and requiring a two-year residency period "ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet.App.50a (quoting *S. Wine & Spirits v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013)). "The same is true with respect to a residency requirement for officers and directors of the retailer," which ensures that those "in a position to alter or influence the retailer's behavior" are "familiar with the community." Pet.App.51a.

Judge Sutton agreed with the majority about the part of the Tennessee law requiring every stockholder of a corporate licensee to comply with the two-year

residency requirement. That stringent requirement, he said, reflected impermissible economic protectionism. Pet.App.54a. So too for the ten-year durational-residency requirement applicable to license renewals. Pet.App.54a–55a.

5. This Court granted the Association's petition for a writ of certiorari. The petition did not seek review of the Sixth Circuit's decision as to the provisions regarding shareholders and license renewals. Thus, the only issue before the Court is whether the Twenty-first Amendment permits states to impose two-year durational-residency requirements on individuals (and the officers and directors of corporations) who apply for retail liquor licenses. *See* Cert. Reply Br. 3.

SUMMARY OF ARGUMENT

I. Tennessee's durational-residency requirement is constitutional. That conclusion follows from the constitutional text, the relevant history, and modern precedent.

A. The second section of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." That language permits states broad latitude to regulate the retail sale of alcohol free from the constraints of the dormant Commerce Clause.

The Amendment's historical context makes that clear. In addition to ending Prohibition, the Amendment was intended to "restore[] to the States the powers they had under the Wilson and Webb-Kenyon Acts." *Granholm*, 544 U.S. at 484. Congress passed these Acts in the years before Prohibition, in response to a now-overruled line of Commerce Clause decisions

that barred the states from regulating alcohol shipped interstate as long as it remained in its "original package." *Id.* at 478–82. The Wilson and Webb-Kenyon Acts made interstate shipments subject to the laws of the states to which they were shipped, thereby empowering states to regulate the distribution of *all* alcohol within state borders, whether or not it originated from out-of-state or remained in its original package. The Acts thus allowed states to channel all liquor sales through regulated distribution channels, including state monopoly systems and systems that "authorized only residents to be licensed to sell liquor, and restricted the number of such licenses." *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 451 (1898).

Americans ratified the Twenty-first Amendment after a thirteen-year experiment with Prohibition. In doing so, they rejected Prohibition—but not the temperance goals that motivated it. To the contrary, one major "purpose" of the Twenty-first Amendment was to more effectively "promote temperance." *Bacchus*, 468 U.S. at 276. Prohibition had proven that, in "the alcohol context, centralized regulation did not work." Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 Va. J. Soc. Pol'y & L. 552, 584 (2006). The Twenty-first Amendment's second section responded by "restor[ing] to the States the powers they had" in the years before Prohibition. *Granholm*, 544 U.S. at 484. This decentralized approach allowed states to pursue policies that best fit local values and conditions, and to experiment with different approaches to the difficult problems inherent in regulating the distribution and use of alcohol.

Most states used their reacquired power to "create[] either state monopolies or distribution systems" through which sales could be closely regulated. *Id.* at 496 (Stevens, J., dissenting). States that permitted private management of retail sales almost always "limit[ed] the issuance of retail . . . licenses to residents of the state or to domestic corporations." *Economic Localism*, 72 Harv. L. Rev. at 1148. Many states passed laws along these lines in the immediate aftermath of the Twenty-first Amendment's ratification. These states often issued licenses only to those who established residency over a period of years. *Infra* 34.

This Court's contemporaneous precedents left the states to do all this "unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). In an opinion by Justice Brandeis, issued just three years after Prohibition's repeal, the Court famously said that recognizing a Commerce Clause exception to the Twenty-first Amendment "would involve not a construction of the Amendment, but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S 59, 62 (1936).

B. The Court later qualified these broad statements, but it did so in ways that confirm the constitutionality of durational-residency requirements. The Court distinguished between "core" and non-core § 2 powers, holding that the Twenty-first Amendment immunizes only "core" laws from dormant Commerce Clause scrutiny. The "core § 2 power" is the power "directly to regulate the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. States exercise that power when they regulate who can sell liquor and in what way. For example, states

exercise their core authority when they channel sales through a three-tier system, or require producers to sell their products to a wholesaler through an in-state resident. *Granholm*, 544 U.S. at 493; *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S 275, 277–78, 283–84 (1972). When states exercise their core authority "to restrict, regulate, or prevent the traffic and distribution of intoxicants with [their] borders," it is "unquestioned" that they face no Commerce Clause scrutiny whatever. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1963).

But laws that are not passed under this "core" power receive no such immunity. Consider laws that "regulate activity outside of a State's territorial domain." Pet.App.48a (Sutton, J., dissenting). Even though the Twenty-first Amendment confers broad authority to regulate the *in-state* distribution of alcohol, it confers no authority to regulate distribution in other states. For example, laws purporting to regulate advertisements broadcast from out of state, or regulations that have the effect of imposing price requirements on sales in other states, fall outside the Twenty-first Amendment's "core" power to regulate the in-state distribution of liquor. *See, e.g., Capital Cities*, 467 U.S. at 714–16; *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989). Such laws go beyond any power that § 2 restored to the states, so the Twenty-first Amendment does not protect them from dormant Commerce Clause scrutiny.

The Court's most recent Twenty-first Amendment case—*Granholm v. Heald*—reflects this core–non-core distinction. *Granholm* recognized that "States have broad power to regulate liquor under § 2 of the Twenty-first Amendment." 544 U.S. at 493. Because

"§ 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts," and because those Acts gave the states authority to craft their own in-state liquor-distribution laws, the Twenty-first Amendment re-empowered states to structure their distribution systems without regard to the dormant Commerce Clause. *Id.* at 484. As a result, it is "'unquestionably legitimate'" for states to "funnel sales through [a] three-tier system." *Id.* at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). Since "the requirement that liquor pass through a licensed in-state wholesaler" and retailer "is a core component of the three-tier system," *id.* at 518 (Thomas, J., dissenting), residency requirements are also unquestionably legitimate.

But the broad power conferred by the Wilson and Webb-Kenyon Acts—and thus by the Twenty-first Amendment—has limits. Neither Act displaced the "line of Commerce Clause cases striking down laws that discriminated against liquor produced out of state." *Id.* at 483 (majority). Since the Twenty-first Amendment does not authorize such laws, they cannot be justified as an exercise of § 2's "core" authority.

Consistent with this distinction between core and non-core § 2 authority, *Granholm* struck down the state laws at issue, which forbade direct-to-consumer "shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers." *Id.* at 493. In-state liquor-distribution "policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489. It is only when states discriminate against out-of-state products, and thus do what the Twenty-first Amendment does not

permit, that the Amendment ceases to provide protection from the dormant Commerce Clause.

C. Tennessee's durational-residency requirement is not subject to the dormant Commerce Clause because it is authorized by the core § 2 power "directly to regulate the sale . . . of liquor within" the state. *Capital Cities*, 467 U.S. at 713. The durational-residency requirement, which dictates who is eligible to work at the retail tier, is part of the structure of Tennessee's "unquestionably legitimate" three-tier system. *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). The requirement thus "regulate[s] . . . the traffic and distribution of intoxicants within [state] borders," bringing it within § 2's core and outside the scope of the Commerce Clause. *Hostetter*, 377 U.S. at 330.

Moreover, Tennessee's durational-residency requirement easily passes muster as a reasonable exercise of legislative judgment. For one thing, the law helps ensure that state and local officials have an "opportunity to determine [a license applicant's] fitness." *See Hinebaugh*, 192 S.E. at 178. For another, it increases the odds that liquor retailers will sell responsibly, because local residents tend to be more "knowledgeable about the community's needs and committed to its welfare." Pet.App.50a (Sutton, J., dissenting). Finally, as two legislators recognized in passing the law, it is a good thing that these laws make it harder to open a liquor store, because reducing supply can help prevent alcohol abuse. BIO.App.9a.

II. The Sixth Circuit majority rejected the Association's argument based on a series of non sequiturs. For example, the majority noted that *Granholm* "de-

clined to overrule" Twenty-first Amendment precedents forbidding discrimination against out-of-state products. Pet.App.15a. The majority also stressed that *Granholm* acknowledged the "general Commerce Clause principle" that states may not discriminate against out-of-state interests. Pet.App.17a. All of that is true, but all of it accords with the principles above. State laws that discriminate against out-of-state products fall outside the "core" of § 2 and are thus subject to the dormant Commerce Clause. Only state laws authorized by the core § 2 power to regulate the distribution of alcohol are immune from "general Commerce Clause principle[s]."

The majority never acknowledged this distinction. Judge Sutton did. As he explained in dissent, the Twenty-first Amendment creates an "exception[] to the normal operation of the Commerce Clause" for state laws regulating the in-state distribution of alcohol. Pet.App.48a (quoting *Capital Cities*, 467 U.S. at 712). Liquor distribution "implicates the States' core interest after the repeal of Prohibition," and so laws regulating distribution are "protected under [§ 2] when they treat liquor produced out of state the same as its domestic equivalent." Pet.App.49a (quoting *Granholm*, 544 U.S. at 489). The majority had no answer to this, and there is none.

ARGUMENT

I. TENNESSEE'S DURATIONAL-RESIDENCY REQUIREMENT IS CONSTITUTIONAL.

"The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at

488. States may regulate the in-state sale of alcohol "unfettered by the Commerce Clause," *Ziffrin*, 308 U.S. at 138—provided "they treat liquor produced out of state the same as its domestic equivalent," *Granholm*, 544 U.S. at 489. Regulations of liquor distribution that meet that condition "are protected under the Twenty-first Amendment." *Id.*

These principles follow from the Twenty-first Amendment's text and history. They likewise follow from this Court's precedents. Those precedents recognize that the Twenty-first Amendment restored to the states the powers they possessed under the Wilson and Webb-Kenyon Acts before Prohibition—including the almost-plenary power over in-state liquor sales. Applying that insight, this Court has held that the Twenty-first Amendment immunizes state regulations from dormant Commerce Clause scrutiny when they are enacted under the states' "core" Twenty-first Amendment power: the power "directly to regulate the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. And under these principles, Tennessee's two-year durational-residency requirement is constitutional.

A. The Twenty-first Amendment makes the dormant Commerce Clause inapplicable to most state laws regulating liquor distribution.

The second section of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Understood in its historical context, this language exempts state laws regulating the retail sale of

alcohol—its "delivery"—from dormant Commerce Clause scrutiny, at least where the laws in question treat alcohol produced in and out of state on equal terms.

*1. **Pre-Prohibition regulation of alcohol.*** Most Americans today "regard alcohol as an ordinary article of commerce." *Granholm*, 544 U.S. at 494 (Stevens, J., dissenting). For much of American history, however, many viewed it "as a lawlessness unto itself." *Duckworth v. Arkansas*, 314 U.S. 390, 398 (1941) (Jackson, J., concurring in result). State laws have long reflected that attitude, imposing special limits on the sale and production of alcohol "for the maintenance of good order and good morals." *The License Cases*, 46 U.S. (5 How.) 504, 590–91 (1847) (op. of McClean, J.).

In the mid-to-late 1800s, this Court's interpretation of the Commerce Clause sometimes stood in the way of state attempts at regulating alcohol. That clause empowers Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. This Court has held that, by expressly giving authority over interstate commerce to Congress, the Constitution implicitly takes that authority from the states. Under the "dormant" or "negative" Commerce Clause, states may not "regulate or otherwise burden the flow of interstate commerce." *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

The dormant Commerce Clause has never stopped states from regulating—or even banning entirely—the in-state sale of alcohol. *See Mugler v. Kansas*, 123 U.S. 623, 657–59 (1887); Pet.App.44a (Sutton, J, dissenting). The conflict arises only when the states stray beyond "purely internal affairs" and begin to

regulate *interstate* commercial conduct. *Leisy v. Hardin*, 135 U.S. 100, 122 (1890). As applied in the late 1800s, the prohibition on state regulation of interstate commerce had at least two effects. First, it prevented states from subjecting liquor produced out of state to burdens from which in-state liquor was exempted. *See, e.g.*, *Walling v. Michigan*, 116 U.S. 446, 455 (1886) (invalidating tax imposed only on out-of-state liquor). Second, the dormant Commerce Clause left states powerless to prevent alcohol from being shipped across their borders. Under the now-rejected "original package" doctrine, courts considered alcohol shipped from other states to be an article of interstate commerce—immune from state regulation—so long as it remained in its original package. *See Leisy*, 135 U.S. at 124. This "left the States in a bind": "They could ban the production of domestic liquor, . . . but these laws were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package." *Granholm*, 544 U.S. at 478.

Congress addressed this problem. In 1890, it passed the Wilson Act, which provided that, "upon arrival in [any] State or Territory," alcohol would "be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory," regardless of whether the alcohol remained in its "original package[]." Ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121). With this law, Congress exercised its Commerce Clause authority to make the legality of interstate alcohol shipments contingent on the laws of the state into which

the alcohol was to be shipped. Though the Wilson Act left in place the cases banning discrimination against out-of-state liquor, it was supposed to close the original-package loophole that out-of-state sellers were using to evade generally applicable state liquor laws. *Granholm*, 544 U.S. at 478–79.

The Wilson Act partly succeeded in closing the loophole. It allowed states to regulate the in-state sale of imported liquor that remained in its original package. For example, this Court recognized that states could "authoriz[e] only residents to be licensed to sell liquor," including liquor still in its original package, "and restrict[] the number of such licenses." *Vance*, 170 U.S. at 451. Some states did indeed impose such residency requirements on retail licensees. *See, e.g.*, Neb. Stat. Rev. § 3844 (1913); R.I. Gen. Laws, ch. 123, § 2 (1909). Some states additionally imposed *durational*-residency requirements on those seeking a license to sell alcohol. *See, e.g.*, Tex. Rev. Civ. Stat., art. 7446 (1911) (two years); Ind. Code § 8323e (1914) (one year).

But this Court's interpretations of the Wilson Act left state laws regulating alcohol vulnerable to the dormant Commerce Clause. The Court held that alcohol did not "arriv[e]" in a state when it reached state lines, but rather when it reached the purchaser (also known as the "place of consignment"). *Vance*, 170 U.S. at 451; *see also Rhodes*, 170 U.S. at 426. Thus, the states' "right to regulate did not attach until the liquor was in the hands" of its initial buyer. *Granholm*, 544 U.S. at 480. So even after the Wilson Act, states could not ban out-of-state liquor from being shipped directly to consumers; the alcohol remained part of interstate

commerce, and thus immune from state regulation, until it reached the buyer.

Congress again entered the fray. In 1913, it closed the direct-to-purchaser loophole through the Webb-Kenyon Act. That law, still in effect today, "prohibit[s]" any "shipment or transportation" of alcohol into a state where it is "intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." 27 U.S.C. § 122. The Act "prevent[ed] the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *James Clark Distilling Co. v. W. Maryland R. Co.*, 242 U.S. 311, 324 (1917). As was true of the Wilson Act, the Webb-Kenyon Act left in place the pre-existing ban on "state laws that discriminated against liquor produced out of state." *Granholm*, 544 U.S. at 483; *but see id.* at 500 (Thomas, J., dissenting) (disputing this interpretation). But so long as states treated in-state and out-of-state alcohol identically, the Act made state laws effective against imported alcohol. Thus, in addition to the states' pre-existing ability to regulate purely in-state sales under their police power, they now had authority to regulate interstate shipments of alcohol to buyers within their borders.

2. Prohibition and repeal. This legal regime became moot with the enactment of the Eighteenth Amendment, which prohibited "the manufacture, sale, or transportation of intoxicating liquors within . . . the United States." U.S. Const. amend. XVIII. But what President Hoover called the "Noble Experiment" ended in failure. *Loretto*, 601 F. Supp. at 856 & n.7. The Eighteenth Amendment did not stop the

consumption of liquor, and did much to create a black market in which organized crime thrived. *See Maxwell's Pic-Pac*, 739 F.3d at 939; Pegram, BATTLING DEMON RUM at 173–74.

Fed up, the American people convened constitutional conventions for the first and only time since the ratification of the Constitution itself. In 1933, they ratified the Twenty-first Amendment, which repealed the Eighteenth Amendment and ended nationwide Prohibition. In addition, § 2 of the Amendment, echoing Webb-Kenyon, provided that "[t]he transportation or importation into any State . . . for *delivery or use therein* of intoxicating liquors, in violation of the laws therefore, is hereby prohibited." U.S. Const. amend. XXI, § 2 (emphasis added); *see* 27 U.S.C. § 122 (prohibiting the "shipment or transportation" of alcohol "into any State . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State").

Section 2 of the Twenty-first Amendment thus "restored" to the States those "powers they had under the Wilson and Webb-Kenyon Acts" before Prohibition. *Granholm*, 544 U.S. at 484; *id.* at 514 (Thomas, J., dissenting) (agreeing with the majority on this point); *see also, e.g.*, Richard A. Epstein, THE CLASSICAL LIBERAL CONSTITUTION 160 (Harv. Univ. Press 2014) (explaining that § 2 restored the federal-state balance to the "status quo ante"). States regained their power to regulate retail alcohol sales; both those occurring purely in-state and those occurring across state lines. The former category of regulations—those governing in-state sales and distribution—formed the core of states' Twenty-first Amendment powers. After all, "[f]rom the vista of 1933, a lawyer (and judge)

would have presumed that the regulation of sales of alcohol *within* the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power." Pet.App.44a (Sutton, J., dissenting); *see also Leisy*, 135 U.S. at 122 (recognizing states' power over "purely internal affairs"). And since the Webb-Kenyon Act had empowered states to subject sales made *across* state lines to the same rules as all other sales, *see James Clark*, 242 U.S. at 323–25, so too did the Twenty-first Amendment.

In restoring to the states "the power to regulate, or prohibit entirely, the transportation or importation of intoxicating liquor within their borders," *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987), the Twenty-first Amendment fulfilled at least two important policy objectives: To more effectively promote temperance, and to decentralize alcohol regulation.

First, although the Twenty-first Amendment repealed Prohibition, its "purpose" was still to "promote temperance." *Bacchus*, 468 U.S. at 276. The American people repealed the Eighteenth Amendment because centralized regulation had failed, not because they rejected the temperance movement's goals. Yablon, 13 Va. J. Soc. Pol'y & L. at 584. Thus, while the Twenty-first Amendment's first section made alcohol legal in states that allowed it, the second "was passed to ensure that . . . states had the legal tools necessary to continue to fully effectuate their temperance goals." *Id.* In this way, the Amendment served states' "interest in reducing alcohol consumption." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996).

The Amendment served another purpose too. By returning regulatory authority to the states—a funda-

mentally federalist act—the Amendment better accommodated diverse viewpoints about the proper place for alcohol in American life. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting). By trusting the states "to devis[e] solutions to difficult legal problems," *Oregon v. Ice*, 555 U.S. 160, 171 (2009), our federalist system "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry,'" *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

The failed experiment with national Prohibition showed that, if ever there were a subject for state experimentation, it was "demon rum." *Granholm*, 544 U.S. at 496 (Stevens, J., dissenting). The personal and communal dangers of alcohol consumption are complex and profound. And—as Prohibition's demise amply showed—no single regulatory solution had proven up to the challenge. Indeed, no single solution *could* solve the puzzle of how best to regulate alcohol. As much in 1933 as today, community tolerance for alcohol consumption and the resulting social dangers varied from region to region. *See* Raymond B. Fosdick & Albert L. Scott, TOWARD LIQUOR CONTROL 10 (Harper & Bros. 1933).

The Twenty-first Amendment, which replaced a national regulatory regime with a state-by-state system, reflected the federalist ideal. It allowed each state to determine how much of a problem alcohol posed and to craft its own solution. "So-called 'dry states' entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors." *Granholm*, 544 U.S. at 496 (Stevens, J., dissenting). The Twenty-first Amendment freed each state to choose the regulatory regime that best served its needs.

3. Post-repeal legislation. Legislation passed in the immediate aftermath of an amendment's ratification is often good evidence of the amendment's meaning. *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). The state laws passed after the Twenty-first Amendment's ratification confirm that it permits state regulation of retail sales in general and durational-residency requirements in particular.

After Prohibition, the vast majority of states legalized the sale and use of alcohol to some degree. *See* Skilton, 7 Brook. L. Rev. at 345 & n.14. But the concern for public safety remained, especially given the "huge, sprawling, and illegal industry for producing and distributing alcoholic beverages" that "already existed." Levine, Contemp. Drug Probs. 63. "The difficulty lay in the need for reconciling two conflicting but equally desirable ends: the limitation of the liquor traffic within the narrowest bounds because of the proven danger inherent in the use of alcohol, and the avoidance of [a] too great restriction [that] would

make for law violation." Harrison & Laine, AFTER REPEAL 42.

Most states steered between these hazards by dividing and separately licensing producers, wholesalers, and retailers. *See* Skilton, 7 Brook. L. Rev. at 349–50. At the retail tier, "States that made liquor legal imposed either state monopoly systems, or licensing schemes strictly circumscribing the ability of private interests to sell and distribute liquor within state borders." *Granholm*, 544 U.S. at 517 (Thomas, J, dissenting); *see* Skilton, 7 Brook. L. Rev. at 349–50. Those states that permitted private management of retail sales almost always "limit[ed] the issuance of retail . . . licenses to residents of the state or to domestic corporations." *Economic Localism*, 72 Harv. L. Rev. at 1148.

Consider, for example, the following state laws from the post-repeal era imposing residency requirement on retailers: Ariz. Rev. Stat. Ann. § 1886d (Supp. 1936); Colo. Rev. Stat. Ann., ch. 89, § 4(a) (1935); Idaho Code Ann. § 18-130 (Supp. 1940); Ill. Liquor Control Act of 1934, art. VI § 2(1); Iowa Code § 1921.019(1) (1939); Ky. Rev. Stat. § 243.100(3) (1942); 1933 Mass. Acts. 753 § 15; 1 Md. Code Ann., art. 2B, § 13(4) (1939); 1 Mo. Rev. Stat. § 4906 (1939); Neb. Comp. Stat. § 53-328 (1929 & Supp. 1941); N.J. Rev. Stat. § 33:1-25 (1937); N.C. Gen. Stat. § 3411(103)(1½) (1939); Ohio Rev. Code. Ann. § 6064-17 (1936); 20 R.I. Gen. Laws Ann., ch. 163, § 4 (1938); 1939 Tenn. Pub. Acts, ch. 49 §8; Vt. Rev. Stat., Tit. 28, ch. 271, § 6156 (1947); Wis. Stat. § 176.05(9) (1937); Wyo. Comp. Stat. § 53-204 (1945); *see also, e.g.*, Mich. Comp. Laws § 9209-29 (Supp. 1935) (allowing distrib-

utors to obtain retail license if they are Michigan citizens); N.D. Rev. Code § 5-0202 (1943) (any legal resident of North Dakota can sell beer in lawful business).

In addition, states often required "a fixed period of prior residence." *Economic Localism*, 72 Harv. L. Rev. at 1148. Beyond ensuring that licensees would be "amenable to the direct process of the state courts," these laws ensured a genuine "opportunity to determine [a license applicant's] fitness" and created "a bar against undesirable nonresidents coming into the state for the sole purpose of" selling alcohol. *Hinebaugh*, 192 S.E. at 178. To this end, New Jersey required a full five years of in-state residence. *See* N.J. Rev. Stat. § 33:1-25. And a number of states imposed residency requirements of up to two years, just as Tennessee does today. *See, e.g.*, Idaho Code Ann. § 18-130 (two years); *accord, e.g.*, Iowa Code § 1921.019(1) ; 1 Md. Code Ann., art. 2B, § 13(4); 1939 Tenn. Pub. Acts, ch. 49 § 8; *see also, e.g.*, 1937 Ga. Laws 103 § 24 (one year); *accord, e.g.*, Ky. Rev. Stat. § 243.100(3); N.C. Gen. Stat. § 3411(103)(1½); Ohio Rev. Code. Ann. § 6064-17; Wis. Stat. § 176.05(9); Wyo. Comp. Stat. §53-204; Vt. Stat. Ann., tit. 28, ch. 271, § 6156 (must be listed for poll taxes within past year).

States enforced residency requirements against companies too. They sometimes did so through direct regulation of corporate or firm residency. *See, e.g.*, Colo. Rev. Stat. Ann., ch. 89, § 4(a); N.C. Gen. Stat. § 3411(103)(1½); *accord* 1937 Ga. Laws 103 § 24 (applying durational-residency requirement to any "person" who applies for a license, defined in § 5(c) of the act to include "any . . . partnership, corporation, or as-

sociation"). Other states indirectly regulated businesses by imposing residency restrictions on partners, directors, officers, or shareholders. New Jersey, for instance, required all partners to individually meet its residency requirements, *see* N.J. Rev. Stat. § 33:1-25, and Ohio required a majority of corporate "members" to do so, *see* Ohio Rev. Code. Ann. § 6064-17. Other states enacted similar rules. *See, e.g.*, Wyo. Comp. Stat. § 53-204 (partners, along with officers and stockholders, must individually satisfy requirements); Wis. Stat. § 176.05(9) (each officer and director of corporation must individually qualify).

The states' three-tier schemes and their accompanying retailer-specific residency requirements were seen as "unquestionably legitimate," just as they are today. *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). Again, this Court had recognized that states could restrict retail licenses to state residents *even before* the Webb-Kenyon Act strengthened state control over liquor. *See Vance*, 170 U.S. at 451. And if states had that power, they necessarily had the "flexibility to define the requisite degree of 'in-state' presence." Pet.App.50a (Sutton, J., dissenting) (quoting *S. Wine*, 731 F.3d at 810). It is unsurprising, then, that no one seems to have doubted the legality of durational-residency requirements in the years after repeal. Indeed, even those challenging liquor-license denials in court would *concede* the constitutionality of such restrictions and seek relief on other grounds. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226, 227–28 (1936) (petitioner conceded constitutionality of Pennsylvania law limiting retail licenses to corporations with officers, direc-

tors, and 51 percent of stockholders that had been residents for at least two years); *accord Hinebaugh*, 192 S.E. at 179 (upholding durational-residency requirement applicable to distributors without even addressing the Commerce Clause). It is similarly unsurprising that, almost a century later, all nine justices in *Granholm* wrote or joined opinions that examined the foregoing history and expressly recognized the unquestioned legitimacy of three-tier systems in general and in-state presence requirements in particular. *See* 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J, concurring in the judgment)); *id.* at 518 (Thomas, J, dissenting).

* * *

The Twenty-first Amendment, read in its historical context, is properly understood as restoring the states' traditional authority to regulate the retail sale of alcohol. The core responsibility assigned to the states by the Twenty-first Amendment is the regulation of liquor distribution. States therefore have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota*, 495 U.S. at 431 (plurality op.) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). They can regulate wholesale and retail sales as they wish, provided they subject in-state and out-of-state alcohol to the same terms. *Granholm*, 544 U.S. at 489. Durational-residency requirements—which regulate in-state liquor sales without discriminating against out-of-state products—are therefore constitutional.

B. Precedent establishes that the dormant Commerce Clause does not apply to "core" exercises of Twenty-first Amendment authority.

Immediately after ratification, this Court understood the Twenty-first Amendment as allowing states to regulate alcohol "unfettered by the Commerce Clause." *Ziffrin*, 308 U.S. at 138. Indeed, Justice Brandeis, writing for the Court, stated that any contrary interpretation "would involve not a construction of the Amendment, but a rewriting of it." *Young's Market Co.*, 299 U.S. at 62.

The Court qualified that broad reading a few decades later. Beginning in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court recognized that "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," and that, because both address the division of authority between the federal and state governments, "each must be considered in the light of the other." 377 U.S. at 332. Even under this qualified approach, however, the Twenty-first Amendment permits the states to regulate alcohol unfettered by the Commerce Clause when they exercise their "core § 2 power": the power "directly to regulate the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. Only when states enact liquor laws outside this core power are they subject to dormant Commerce Clause scrutiny.

Core laws. It is "unquestioned" that states are unfettered by the Commerce Clause when they exercise their "power to restrict, regulate, or prevent the traffic and distribution of intoxicants within [their] borders." *Hostetter*, 377 U.S. at 330. As this Court has repeatedly put it, the "Twenty-first Amendment

grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *Midcal*, 445 U.S. at 110); *North Dakota*, 495 U.S. at 431 (plurality op.) (quoting *Midcal*, 445 U.S. at 110). This allows states to "structure the[ir] liquor distribution systems" to best serve their policy goals and the needs of their populations.

In light of these principles, state laws that "funnel sales through [a] three-tier system" are "'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). In *North Dakota*, for example, the Court considered a three-tier system of liquor distribution; one that distinguished among "out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers." 495 U.S. at 428. North Dakota law, like that of many other states, provided that suppliers could "sell to only licensed wholesalers or federal enclaves," and that "[l]icensed wholesalers" could sell to licensed retailers, other licensed wholesalers, and federal enclaves. *Id.* In rejecting a Supremacy Clause challenge to certain aspects of this regime, the Court stressed that North Dakota's regulatory scheme fit "within the core of the State's power under the Twenty-first Amendment." *Id.* at 432.

This Court has also upheld laws that permit producers to transfer liquor to in-state wholesalers only through a "resident representative." *Heublein*, 409 U.S. at 277, 283–84. In *Heublein*, this Court held that such laws are "an appropriate element in the State's system of regulating the sale of liquor" and thus are protected by the Twenty-first Amendment from

dormant Commerce Clause scrutiny. *Id.* at 283. "This Court made clear in the early years following the adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* (quoting *Hostetter*, 377 U.S. at 330).

Similarly, this Court has recognized that the Twenty-first Amendment bolsters state authority to ban the sale and consumption of alcohol at nightclubs. *California v. LaRue*, 409 U.S. 109, 114–16 (1972). "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *Id.* at 114. And in upholding California's regulatory scheme, the Court rebuffed the challengers' efforts to second-guess state officials' legislative judgments. It reasoned that "wide latitude as to choice of means to accomplish a permissible end must be accorded to" the State for the exercise of its "power under the Twenty-first Amendment." *Id.* at 116.

A later decision "disavow[ed]" *LaRue*'s reasoning "insofar as it relied on the Twenty-first Amendment" to uphold a state law against a *free-speech* challenge. *44 Liquormart*, 517 U.S. at 515. Rightly so: While the "Twenty-first Amendment limits the effect of the dormant Commerce Clause," it "'does not license the States to ignore their obligations under other provisions of the Constitution." *Id.* at 416 (quoting *Capital*

Cities, 467 U.S. at 712). But this Court has never questioned *LaRue*'s recognition that the distribution of liquor is within the core of authority that the Amendment grants to the states. Neither has it doubted *LaRue*'s suggestion that states must be given "wide latitude" to regulate alcohol distribution as they see fit. 409 U.S. at 116.

These precedents illustrate that, when states exercise their "core power" to regulate the system through which in-state sales are made, their regulations are "protected under the Twenty-first Amendment"—and unfettered by the dormant Commerce Clause. *Granholm*, 544 U.S. at 489.

Non-core laws. This raises the question of which laws fall outside the states' core power "directly to regulate the sale or use of liquor within" state borders. First, that category includes laws that attempt "to regulate activity outside of a State's territorial domain." Pet.App.48a (Sutton, J., dissenting). For example, a ban on alcohol-related television advertisements broadcast from other states does not constitute an exercise of "core" Twenty-first Amendment power. *Capital Cities*, 467 U.S. at 714. Similarly, this Court has held that states stray from their core authority when they enact price-affirmation statutes—that is, laws requiring that alcohol be sold at prices no higher than those charged in surrounding states. *See, e.g.*, *Healy*, 491 U.S. at 343; *Brown-Forman Distillers Corp., v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986). Such laws, the Court emphasized, "have the inherent practical extraterritorial effect of regulating liquor prices in other States" because they prevent entities from engaging in competitive pricing

elsewhere. *Healy*, 491 U.S. at 343; *see also id.* at 335–39.

In addition to regulating out-of-state conduct, such laws are unrelated to the structure of the alcohol distribution system, the responsibility for which the Twenty-first Amendment leaves to the states. *Granholm*, 544 U.S. at 489. They do not, for example, regulate who can sell alcohol to whom and in what way—or, in the words of the Twenty-first Amendment, the "delivery or use" of alcohol within a state. As *Granholm*, *Heublein*, and *LaRue* recognized, state laws that regulate the "delivery or use" of alcohol within a state are at the heart of the Twenty-first Amendment; *those* are the regulations that are immune from dormant Commerce Clause scrutiny as direct regulations of alcohol sales within state borders. *See Granholm*, 544 U.S. at 488; *Heublein*, 409 U.S. at 277; *LaRue*, 409 U.S. at 114–15.

Another category of non-core laws consists of state regulations that fail to "treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. Such laws are not exercises of the "core powers of § 2" because they are not authorized by the Twenty-first Amendment at all. That is because the Amendment—which, again, addresses the "delivery or use" of alcohol, not its production—does not empower states to pass laws that discriminate against out-of-state products. As explained above, and in *Granholm*, states had no power to pass laws that discriminated against out-of-state products before Prohibition. That remained true even after Congress passed the Wilson and Webb-Kenyon Acts, which did not "displace" the "line of Commerce Clause cases striking down state laws that discriminated

against liquor produced out of state." *Granholm*, 544 U.S. at 483. The Twenty-first Amendment simply restored state authority over alcohol regulation by effectively constitutionalizing Webb-Kenyon; it did not create new regulatory powers. *Supra* 29–30; *Granholm*, 544 U.S. at 483. So, as before, states were left without authority to discriminate against out-of-state liquor. *Granholm*, 544 U.S. at 484–85. State laws that purport to do so are outside the Amendment's scope altogether—and subject to the dormant Commerce Clause. *Id.* at 485–86.

The Court applied this core–non-core distinction in *Bacchus*. That case concerned a Hawaii law that exempted locally produced liquors, and only those liquors, from otherwise-applicable sales taxes. 468 U.S. at 265. The State did not "seek to justify its tax on the ground that it was designed to promote temperance or carry out any other purpose of the Twenty-first Amendment," *id.* at 276; it was "undisputed" that the law served no purpose other than pure economic protectionism, *id.* at 271. Still, the State argued that, even if "the tax exemption violat[ed] ordinary Commerce Clause principles, it [was] saved by the Twenty-first Amendment." *Id.* at 274. The Court disagreed. It explained that the Twenty-first Amendment shields state laws from the Commerce Clause only when "the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275. And since the Twenty-first Amendment provides no authority to discriminate against out-of-state products, Hawaii's law was not an exercise of the Twenty-first Amendment's "central purpose." *Id.* at 276. In other words, because Hawaii

did not pass its tax law pursuant to the core § 2 power to regulate the distribution of alcohol, the Twenty-first Amendment did not shield that law from the dormant Commerce Clause.

In his dissent below, Judge Sutton read *Bacchus* to stand for the even broader proposition that the Twenty-first Amendment provides no shelter for *any* state liquor laws that "serve no purpose besides 'economic protectionism.'" Pet.App.49a (quoting *Bacchus*, 468 U.S. at 276). Because Tennessee's law is amply justified by legitimate, non-protectionist concerns, the Court need not decide whether the Twenty-first Amendment contains a general, economic-protectionism exception. *Infra* 47–51.

But *Bacchus* does not create such an exception anyway. True, it says that state laws constituting "mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." 468 U.S. at 276. But the Court made that comment while discussing a law that discriminated between in-state and out-of-state products. Thus, *Bacchus* stands only for the principle that laws that discriminate against out-of-state alcohol fall outside the Twenty-first Amendment's scope—the same principle that this Court recognized in *Granholm*. The Court did not purport to adopt a rule prohibiting protectionist liquor laws generally. That would require departing from the long-settled principle that states may regulate alcohol under the Twenty-first Amendment "without let or hindrance by courts regarding the 'reasonableness'" of their laws. *Carter v. Virginia*, 321 U.S. 131, 143 (1944) (Frankfurter, J., concurring). A bar on protectionist laws would amount to reasonableness review:

In each future case, the Court would have to decide whether the law in question is supported by serious-enough non-protectionist interests; a form of review that would bog down the courts in policy disputes and leave the states with little certainty as to the validity of their liquor laws. That result is irreconcilable with the determination by the "people of the United States," reflected in the Twenty-first Amendment, that the level of state control over liquor regulation "should be governed by a specific and particular constitutional provision," not left "to the courts." *Duckworth*, 314 U.S. at 398 (Jackson, J., concurring in result).

* * *

This Court's precedents confirm that the Twenty-first Amendment leaves states with virtually complete control over the structure of their in-state alcohol-distribution systems. The qualifier "virtually" is needed because the Amendment does not permit laws that discriminate against out-of-state goods. But when it comes to structuring a liquor distribution system, state "policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489.

C. Tennessee's two-year durational requirement is constitutional.

1. These principles establish the constitutionality of durational-residency requirements, including Tennessee's. The Twenty-first Amendment restored the states' longstanding power, abridged only briefly by the Eighteenth Amendment, over purely in-state alcohol sales. The states exercised that newly regained

power by enacting residency and durational-residency requirements for retailers. *Supra* 32–36. And eighty years of precedent have done nothing to call the legality of these laws into question, or otherwise to water down the states' authority to decide who may sell alcohol at retail within their borders. To the contrary, precedent confirms the constitutionality of durational-residency requirements. When states impose durational-residency requirements on retailers, they "directly . . . regulate the sale . . . of liquor within their borders." *Capital Cities*, 467 U.S. at 713. Such requirements treat "liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. Thus, states exercise their "core § 2 power" when they enact durational-residency requirements, *Capital Cities*, 467 U.S. at 713, immunizing those requirements from Commerce Clause scrutiny.

That is especially clear when it comes to durational-residency requirements, like Tennessee's, applicable to retailers within a state's three-tier system. Again, *Granholm* establishes that such systems are "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). It also establishes that, in using this unquestionably legitimate form of liquor regulation, states can "require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment) (quoted in *Granholm*, 544 U.S. at 489). The same goes for retailers. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190–91 (2d Cir. 2009). Thus, to challenge the validity of residency requirements on retailers is to "challeng[e] the three-tier system itself." *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006)

(op. of Niemeyer, J.); *see also Arnold's Wines*, 571 F.3d at 190–91. If three-tier systems are unquestionably valid, so are in-state residency requirements.

And so are *durational*-residency requirements. If states may impose in-state residency requirements, they must have the ability "to define the requisite degree of 'in-state presence' necessary for participating as a retailer or wholesaler." Pet.App.50a (Sutton, J., dissenting) (quoting *S. Wine*, 731 F.3d at 810). As is true in all of constitutional law, the power to do something implies the power to do so effectively. *See McCulloch v. Maryland*, 17 U.S. 316, 409 (1819); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 17 (2013). Thus, the power to require residency implies the power to define residency.

2. It is no answer to say that the Twenty-first Amendment implicitly dictates some level of in-state presence that makes one a "resident" for purposes of durational-residency laws. It does not. States impose varying durational-residency requirements in any number of contexts, and their power to do so is uncontroversial. *Compare* Cal. Educ. Code § 68017 ("A 'resident'" for in-state tuition purposes "is a student who has residence . . . in the state for more than one year") *with* Cal. Fam. Code § 2320(a) (party seeking divorce must be "resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition"). It would be bizarre if they lacked the power to do so in a realm in which the Constitution expressly authorizes them to regulate: in-state alcohol distribution.

Taking from the states the ability to define what constitutes enough in-state presence would also un-

dermine one of the Twenty-first Amendment's primary purposes: empowering states to experiment with the best ways of regulating alcohol sales. Many states share Tennessee's judgment that durational-residency requirements play an important role in ensuring the responsible consumption of alcohol. *See* Pet. 24 n.3 (collecting state statutes). Others have chosen different means of achieving that end. But that is precisely the point: States, not courts, get to decide which regulatory regimes best suit their particular needs and preferences. And, when it comes to the regulation of in-state sales and distribution, litigants do not get to come to court and insist "that the same results could have been accomplished" through different means." *LaRue*, 409 U.S. at 116. It may be that there is no perfect solution when it comes to alcohol regulation. It may also be that the best solution differs from state to state. Given the complex and varying nature of the issue, it is far better to have "fifty-one imperfect solutions rather than one imperfect solution." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 216 (2018). Tennessee's decision to require that retailers become true members of a community before selling alcohol to its residents thus exemplifies the federalist values inherent in the Twenty-first Amendment.

3. To the extent it matters, there are good, non-protectionist public-policy reasons for Tennessee's durational-residency law. In the same statute that imposes the durational-residency requirement, Tennessee's legislature codified that requirement's purpose:

> Because licenses granted under this section include the retail sale of liquor, spirits and high

> alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state . . . .

Tenn. Code Ann. § 57-3-204(b)(4).

Since the repeal of Prohibition, states have imposed durational-residency requirements for these very reasons. Such requirements ensure that the party in charge of distributing alcohol—a potentially dangerous product—is "amenable to the direct process of the state courts, as a bona fide resident." *Hinebaugh*, 192 S.E. at 178. They also permit a "better opportunity to determine [an applicant's] fitness," and create a "bar against undesirable nonresidents coming into the state for the sole purpose of becoming distributors." *Id.* By limiting retailer's licenses to those over whom the state has a "higher degree of oversight" and "control," Tenn. Code Ann. § 57-3-204(b)(4), the state facilitates its review of retail-license applications. The requirement is especially important for facilitating review by local officials, from whom retail-license applicants must seek a certificate of qualification, *id.* at § 57-3-208, who generally lack the states' investigatory resources.

In addition to all this, the two-year residency requirement for liquor retailers increases the odds "that

they will be knowledgeable about the community's needs and committed to its welfare." Pet.App.50a (Sutton, J., dissenting). Retailers form the "final link in the distribution chain" of alcohol, and are thus "closest to the local risks" related to its sale, such as 'drunk driving, domestic abuse, [and] underage drinking." Pet.App.50a (Sutton, J., dissenting) (quoting *S. Wine & Spirits*, 731 F.3d at 811). The long-time resident who attends football games on Fridays is less likely to be duped by the drum major's fake ID on Saturdays. She is also less likely to do business with the town drunk if she knows he will drive around on the same streets that her family and friends use.

The idea that those who better know a community better serve it is hardly foreign. Indeed, the Constitution, which sets a 14-year durational-residency requirement for the President, reflects that very notion. *See* U.S. Const. art. II, § 1, cl.2. It also "may explain why Congress requires federal court of appeals judges to live within their circuits." Pet.App.50a (Sutton, J., dissenting) (citing 28 U.S.C. § 44(c)). It likely explains why state and local governments often impose durational-residency requirements on those who wish to serve the community as police officers or elected officials. *See, e.g.*, Mo. Stat. § 542.190; Me. Const. art. V, Pt. 1, § 4; Tex. Const. art. III, § 6. And it almost surely explains why jurisdictions impose these requirements on those who wish to work in businesses—from pawn shops to gambling facilities to adult-entertainment stores—that risk degrading the local community or facilitating crime if improperly managed. *See, e.g.*, McDonough, Georgia Code of Ordinances, Tit. 5, ch. 5.40.030(A)(b); Ala. Code § 45-32-150.05(3); Manhattan, Kansas Code of Ordinances § 5-68.

All of this more than justifies the two-year durational-residency requirement for individual license applicants—and certainly shows that the requirement cannot be dismissed as mere economic protectionism. "The same is true with respect to a residency requirement for officers and directors of" corporate retailers, such as the one Tennessee imposes. Pet.App.51a (Sutton, J., dissenting). Such requirements ensure that those "in a position to alter or influence the retailer's behavior" are familiar with the community's needs. Pet.App.51a (Sutton, J., dissenting). Tennessee's "legislature legitimately could believe that a [retailer] governed predominantly by [Tennessee] residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities . . . that liquor distribution may produce." *S. Wine*, 731 F.3d at 811.

The durational-residency requirements also further the Twenty-first Amendment's purpose of encouraging temperance. They do so by making it harder to purchase and sell alcohol, thus discouraging its use. The effect may be indirect, but it is also intentional. Discussion on the House floor during a 1984 amendment to Tennessee's residency requirements centered around the relationship between residency requirements and reduced alcohol consumption.

> Rep. Covington: Actually this might cut down on the sale of liquor in the state of Tennessee and prevent more people from getting drunk, more drunks on the streets. Is that what you're trying to do in effect?

> Rep. Rhinehart: I'm trying to restrict the sale of it [liquor], yes sir.

BIO.App.9a. As these legislators recognized, durational-residency requirements like Tennessee's promote temperance by preventing out-of-state retailers from setting up shop and selling to residents the minute they establish an in-state corporate entity. The result? Fewer "drunks on the streets," *id.*—exactly the goal the Twenty-first Amendment was intended to serve. *See Bacchus*, 468 U.S. at 276; *44 Liquormart*, 517 U.S. at 504.

To be sure, restricting the supply of consumer products is not always a good thing. But alcohol is not a typical product. When it comes to a dangerous and addictive drug like alcohol, reasonable minds can differ about the virtues of a large, low-cost supply. Indeed, one major concern in the pre-Prohibition era was the *excess* of competition, spurred by the tied-house system, which drove down prices and encouraged overserving. Pegram, BATTLING DEMON RUM at 96–97; Kerr, ORGANIZED FOR PROHIBITION at 23–24. In the aftermath of Prohibition's repeal, almost every state banned the tied-house system, apparently concluding that the virtues of competition did not outweigh its costs. Pegram, BATTLING DEMON RUM at 186. The Twenty-first Amendment bolstered their authority to do so—to inhibit competition in furtherance of moderation. Promoting "the excess of the drunkard" is not "a constitutional duty." *The License Cases*, 46 U.S. (5 How.) at 591 (op. of McLean, J.).

* * *

People might fairly debate whether the benefits of durational-residency restrictions outweigh their

costs. But the Constitution "does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). That is particularly true where alcohol is concerned. The Twenty-first Amendment affords States special leeway to craft regulatory regimes that, in their view, protect their citizens from the dangers of drinking. It does not permit courts to second-guess those decisions in the name of the dormant Commerce Clause. But even if it did, Tennessee's laws would easily survive whatever limited scrutiny such laws receive.

II. THE DECISION BELOW WAS WRONG.

In striking down Tennessee's durational-residency requirement, the Sixth Circuit fundamentally misunderstood the meaning of the Twenty-first Amendment and this Court's precedents. The panel majority gave "six reasons" for holding that, notwithstanding the Twenty-first Amendment, Tennessee lacked authority to require retailers, or their corporate principals, to reside in-state for two years before becoming eligible for a license. Pet.App.15a. Each misses its mark.

First, the majority emphasized that "the Supreme Court explicitly declined to overrule *Bacchus* in *Granholm*." Pet.App.15a. That is true, of course. But *Bacchus* is consistent with *Granholm*: Both cases simply recognize that the Twenty-first Amendment does not empower states to discriminate against out-of-state *products*. Because durational-residency requirements do nothing of the sort, neither *Granholm* nor *Bacchus* undermines their constitutionality.

Second, the majority noted that *Granholm*, like *Bacchus*, described "a general Commerce Clause principle: the prohibition of discrimination against out-of-state economic interests." Pet.App.17a. Of course, the dormant Commerce Clause *generally* prohibits states from discriminating against out-of-state interests—an important background principle that *Granholm* necessarily recognized in adjudicating a dormant Commerce Clause challenge. But just as *Granholm* did not overrule *Bacchus*, neither did it overrule precedents recognizing that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities*, 467 U.S. at 712. And *Granholm* itself held that "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. Just so here.

Third, the Sixth Circuit majority noted that "the flow of products across state lines is not the sole concern under the dormant Commerce Clause." Pet.App.16a; *see also* Pet.App.18a–19a. That is true, but irrelevant. Again, the Twenty-first Amendment—which, like the Commerce Clause, speaks to the division of authority between the federal and state governments—empowers states to regulate the in-state sale and distribution of alcohol *without regard* to what the dormant Commerce Clause might otherwise require.

Fourth, again citing *Granholm*, the majority emphasized that alcohol regulation is not immune from scrutiny under the dormant Commerce Clause. *See* Pet.App.19a–20a. That is of course true: If alcohol-related regulations were immune from dormant Commerce Clause scrutiny, none would ever have been

struck down under the Commerce Clause. What the panel majority missed is the line—derived from the constitutional text, historical context, and this Court's precedents—between laws that implicate the core purposes of the Twenty-first Amendment (regulations of the in-state sale or distribution of alcohol), and laws that do not (such as regulations of out-of-state conduct). As explained above, it is only when States exercise their core Twenty-first Amendment authority, by regulating the *in-state sale or distribution* of alcohol, that their laws are protected from dormant Commerce Clause scrutiny. And that is the case here.

Fifth, the majority reasoned that "a state's alcoholic-beverages law is not immune simply because it is part of a three-tier system." Pet.App.20a. That is a strawman. Of course, *Granholm* recognized that the basic structure of such systems is "unquestionably legitimate." 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality)). But that is the consequence of the broader constitutional principles *Granholm* described, not a rule in itself. *Granholm*'s point was that the Twenty-first Amendment empowers states to regulate the in-state sale and distribution of alcohol in whatever manner they choose (be it through a three-tier system or otherwise) so long as they do not regulate out-of-state conduct or discriminate against out-of-state products. *Supra* 23–44. Tennessee's durational-residency requirement is protected because it fits that bill—not simply because it is part of Tennessee's three-tier system.

Finally, the majority noted that *Granholm* held neither that "the Commerce Clause applies only to alcoholic-beverages laws regarding producers" nor that the "Twenty-first Amendment automatically protects

laws regarding wholesalers and retailers." Pet.App.22a, 23a. That has never been the Association's argument. The Twenty-first Amendment does not protect state regulatory regimes that discriminate against out-of-state *products*. *See Granholm*, 544 U.S. at 489. Nor does it cover laws that regulate out-of-state conduct, regardless whether the law implicates wholesalers or retailers. But when it comes to the regulation of the in-state sale or distribution of alcohol, *Granholm* was clear: State "policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.*

The whole of these six points is no greater than the sum of its parts. Like the Fifth Circuit's decision in *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016), on which the Sixth Circuit majority relied, the Sixth Circuit's majority decision neglected the text of the Twenty-first Amendment and its historical context. It also missed the precedential forest for the trees, fixating on a few stray lines from *Granholm* and *Bacchus* without paying any heed to the broader precedential landscape or offering a workable rule going forward.

By focusing on the Twenty-first Amendment's text and history alongside this Court's precedents, the Association has offered a workable rule that is true to both: So long as "they treat liquor produced out of state the same as its domestic equivalent," *Granholm*, 544 U.S. at 489, states may regulate the in-state sale of alcohol "unfettered by the Commerce Clause," *Ziffrin*, 308 U.S. at 138. That describes Tennessee's law exactly.

CONCLUSION

This Court should reverse the Sixth Circuit, and hold that Tennessee's two-year durational-residency requirement is a permissible exercise of its Twenty-first Amendment authority.

November 13, 2018

Respectfully submitted,

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Ave. North,
Suite 340-M
Nashville, TN 37201

Benjamin M. Flowers
JONES DAY
325 John H. McConnell
Blvd., Suite 600
Columbus, OH 43215

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

No. 18-96

In The Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, INTERIM DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; TENNESSEE FINE WINES & SPIRITS, LLC, DBA TOTAL WINE SPIRITS BEER & MORE; and AFFLUERE INVESTMENTS, INC., DBA KIMBROUGH FINE WINE & SPIRITS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT AFFLUERE INVESTMENTS, INC.

ANYA BIDWELL
INSTITUTE FOR JUSTICE
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

DANA BERLINER
JEFFREY H. REDFERN
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
dberliner@ij.org
jredfern@ij.org

MICHAEL E. BINDAS
Counsel of Record
INSTITUTE FOR JUSTICE
600 University Street
Suite 1730
Seattle, WA 98101
(206) 957-1300
mbindas@ij.org

Counsel for Respondent Affluere Investments, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the court of appeals correctly held that the Twenty-first Amendment does not empower states to withhold a retail liquor license from an otherwise eligible applicant simply because the applicant has not resided in the state for a specified number of years.

PARTIES TO THE PROCEEDING

Petitioner is Tennessee Wine and Spirits Retailers Association. Respondents are Zackary W. Blair, in his official capacity as Interim Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines & Spirits, LLC, dba Total Wine Spirits Beer & More; and Affluere Investments, Inc., dba Kimbrough Fine Wine & Spirits.

RULE 29.6 STATEMENT

Respondent Affluere Investments, Inc. is not the subsidiary or affiliate of any publicly-owned corporation, and no publicly-owned corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
SUMMARY OF THE ARGUMENT	9
ARGUMENT	12
I. The Twenty-First Amendment Does Not Empower Tennessee To Impose Durational Residency Requirements For Retail Liquor Licenses	12
A. The Nondiscrimination Principle Applies To All State Alcohol Laws, Not Merely Those Regulating Out-Of-State Products	13
B. After *Granholm*, Discriminatory Laws Are Not Saved By The "Core" Concerns Of The Twenty-First Amendment	19
C. Even If The "Core" Concerns Test Still Applies, Tennessee's Durational Residency Requirements Fail It	24
II. Tennessee's Durational Residency Requirements Violate The Privileges Or Immunities Clause Of The Fourteenth Amendment	27

TABLE OF CONTENTS—Continued

Page

A. This Court Can And Should Reach The Privileges Or Immunities Issue 29

B. This Court's Privileges Or Immunities Precedent Protects A Newly-Arrived Resident's Right To Be Treated On Equal Terms With Longtime Residents 30

C. As Originally Understood, The Clause Protected The Right To Migrate In Connection With Employment 38

1. The Right To Migrate In The Antebellum Period..... 38

2. The Right To Migrate In The Early Postbellum Years 42

3. The Joint Committee On Reconstruction 46

4. Debate Over The Civil Rights Act Of 1866 And Other Pre-Fourteenth Amendment Legislation 48

5. Debate Over The Fourteenth Amendment 53

6. Understanding Of The Ratifying Public 57

D. Invalidating The Durational Residency Requirements Would Promote, Not Hinder, Federalism 62

CONCLUSION 64

TABLE OF AUTHORITIES

Page

CASES

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) ..... *passim*

Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002) 24, 25

Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006) 22

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986) 16

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 18, 19

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 20, 21, 22, 23, 26

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) ..... *passim*

Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) 29, 30

Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) ..... *passim*

Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003) 21

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) 31, 39, 40, 41

Dunn v. Blumstein, 405 U.S. 330 (1972) 33

Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010) 22

Granholm v. Heald, 544 U.S. 460 (2005) ..... *passim*

Gregory v. Ashcroft, 501 U.S. 452 (1991) 63

TABLE OF AUTHORITIES—Continued

Page

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) 29

Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) 16

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 14, 20

Kowalski v. Tesmer, 543 U.S. 125 (2004) 28, 29

Lebamoff Enters., Inc. v. Huskey, 666 F.3d 455 (7th Cir. 2012) 24

Lebamoff Enters., Inc. v. Rauner, No. 17-2495, 2018 WL 6191351 (7th Cir. Nov. 28, 2018) 18

Lewis v. BT Invest. Managers, Inc., 447 U.S. 27 (1980) 18

McClung v. Silliman, 19 U.S. 598 (1821) 29

McDonald v. City of Chicago, 561 U.S. 742 (2010) ..... *passim*

Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250 (1974) 33

New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) 9

North Dakota v. United States, 495 U.S. 423 (1990) 17, 24

Pete's Brewing Co. v. Whitehead, 19 F. Supp. 2d 1004 (W.D. Mo. 1998) 24

Saenz v. Roe, 526 U.S. 489 (1999) ..... *passim*

Shapiro v. Thompson, 394 U.S. 618 (1969) 33

Singleton v. Wulff, 428 U.S. 106 (1976) 28

TABLE OF AUTHORITIES—Continued

Page

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) ..... *passim*

Smith v. Phillips, 455 U.S. 209 (1982) 29

South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) 12, 17

Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) 29

Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) 9

Zobel v. Williams, 457 U.S. 55 (1982) 62

CONSTITUTIONAL PROVISIONS

Or. Const. of 1857, art. XVIII, § 4 41

U.S. Const. amend. XIII 31

U.S. Const. amend. XIV, § 1 ..... *passim*

U.S. Const. amend. XXI ..... *passim*

U.S. Const. art. IV, § 2 ..... *passim*

STATUTES & CODES

Civil Rights Act of 1866, 14 Stat. 27 (1866) 48, 53

Second Freedmen's Bureau Act, 14 Stat. 173 (1866) 52, 53, 54

Tenn. Code Ann. § 57-3-204(b)(2)(A) 3, 4, 5

Tenn. Code Ann. § 57-3-204(b)(3)(A) 4

Tenn. Code Ann. § 57-3-204(b)(3)(B) 4

Tenn. Code Ann. § 57-3-204(b)(3)(D) 4

TABLE OF AUTHORITIES—Continued

Page

Tenn. Code Ann. § 57-3-208(b)(2) 25

Tenn. Code Ann. § 57-3-208(c) 26

Tenn. Code Ann. § 57-3-213(a) 3

OTHER AUTHORITIES

Akhil Reed Amar, *Lost Clause: The Court Rediscovers Part of the Fourteenth Amendment*, New Republic, June 14, 1999 ..... 57, 61

Chester J. Antieau, *The Original Understanding of the Fourteenth Amendment* (1981) 59

Cong. Globe, 35th Cong., 2nd Sess. (1859) 42

Cong. Globe, 39th Cong., 1st Sess. (1866) ..... *passim*

David E. Bernstein, *Only One Place of Redress* (2001) ..... *passim*

David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781 (1998) 42, 43, 44, 45

Davison M. Douglas, *Contract Rights and Civil Rights*, 100 Mich. L. Rev. 1541 (2002) 43

Dayton Daily Journal (Ohio), July 9, 1866 59

Douglas R. Egerton, *The Wars of Reconstruction* (2014) 42

Eric Foner, *Reconstruction* (updated ed. 2014) 43, 45, 46, 49

Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 Chi.-Kent L. Rev. 49 (2007) 40, 41

TABLE OF AUTHORITIES—Continued

Page

Jacobus tenBroek, *Equal Under Law* (rev. ed. 1965) 54

James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 Wake Forest L. Rev. 89 (1984) 60

James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435 (1985) 59

James W. Fox Jr., *Publics, Meanings and the Privileges of Citizenship*, 30 Const. Comment. 567 (2015) 46

Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. Chi. L. Rev. 1161 (1984) 43, 44, 45

Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 Cornell L. Rev. 523 (1997) 38, 63

Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110 (1999) 63

Michael Kent Curtis, *No State Shall Abridge* (1986) 58

Oscar Zeichner, *The Legal Status of the Agricultural Laborer in the South*, 55 Political Science Quarterly 412 (1940) 45

Philadelphia North American and United States Gazette, June 30, 1868 59

TABLE OF AUTHORITIES—Continued

Page

Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61 (2011) 51, 52, 54

Political Affairs: National Politics: The Proposed Constitution Amend.—What it Provides, N.Y. Times, Nov. 15, 1866 58

Privileges and Immunities Act, H.R. Res. 437, 39th Cong. (1st Sess. 1866) 51, 52

Proceedings of the Republican Union State Convention (Sept. 5, 1866) 58

Raymond T. Diamond, *National and Local Perspectives on States' Use of Criminal Law to Regulate Undocumented or Unauthorized Migration*, 12 Loy. J. Pub. Int. L. 375 (2011) 39

Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717 (2003) 41

Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. 47, 48

Robert Cruden, *The Negro in Reconstruction* (1969) 42

Speech of Hon. Columbus Delano, Cincinnati Commercial, Aug. 31, 1866 59

Tennessee Alcoholic Beverage Commission, Minutes of April 25, 2017 Comm'n Meeting (May 23, 2017) 2, 6

The National Question: The Constitutional Amendments—National Citizenship, N.Y. Times, Nov. 10, 1866 58

TABLE OF AUTHORITIES—Continued

Page

Theodore Brantner Wilson, *The Black Codes of the South* (1965) 43

W. Jeffrey Bolster, *Black Jacks* (1997) 39

W.E.B. Du Bois, *Black Reconstruction* (1935) 44

Wadesboro Argus, Oct. 11, 1866 60

William Cohen, *At Freedom's Edge* (1991) 43, 44

William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. of S. Hist. 31 (1976) 44

INTRODUCTION

The Tennessee Wine and Spirits Retailers Association asks whether the Twenty-first Amendment allows a state to discriminate against newly-arrived residents, or residents of other states, in the occupation of owning a retail liquor store. It does not, and such discrimination is prohibited by both the Commerce Clause and Privileges or Immunities Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in Petitioner's brief, the Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses require this Court's consideration. They provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

1. For Doug and Mary Ketchum, the ability to move to a new state in pursuit of a livelihood, and to be treated equally in that new state, is a matter of life and death. At their doctor's urging, they left their home in Utah after their thirty-two-year-old daughter, who has cerebral palsy and quadriplegia, began suffering severe health effects from the temperature inversion and air stagnation in the Salt Lake Valley. *See* J.A. 58, 63. The Ketchums settled on Tennessee after learning of an opportunity to purchase a wine and liquor store in Memphis. Becoming business owners would afford them flexibility to care for their daughter, who requires full-time attention, while also providing for their family. J.A. 58, 63, 65.

The Ketchums, through Affluere Investments, Inc. (hereinafter "Affluere"), signed an agreement to purchase Kimbrough Towers Fine Wine in April 2016, using much of their retirement savings to do so. J.A. 62-63. Doug and Mary are the sole officers, stockholders, and directors of Affluere. J.A. 62, 66-67, 79; Am. Answer of Tenn. Wine & Spirits Retailers Ass'n 1-2.[1]

In May 2016, while still in Utah, the Ketchums, through Affluère, applied for a retail liquor license with the Tennessee Alcoholic Beverage Commission (hereinafter "Commission"). J.A. 20, 59, 63. Although they knew that Tennessee had durational residency

---

[1] *See also* Minutes of Apr. 25, 2017 Comm'n Meeting 1 [hereinafter Minutes], https://www.tn.gov/content/dam/tn/abc-documents/abc-documents/CM_MMRCM_MeetingMinutes_April252017.pdf.

requirements for retail liquor licenses, they also knew the Tennessee Attorney General had issued two opinions determining those requirements to be unconstitutional under the Commerce Clause. *See* Tenn. Op. Att'y Gen. No. 14-83 (2014); Tenn. Op. Att'y Gen. No. 12-59 (2012). Because of those opinions, the Commission was not enforcing the requirements and had issued licenses to non-residents. J.A. 63, 71-72; *see also* J.A. 51, 100.

In July 2016, Doug and Mary became residents of Tennessee, moving there in anticipation of acquiring the wine and liquor shop. J.A. 64. Around the same time, however, Petitioner Tennessee Wine and Spirits Retailers Association (hereinafter "Association") threatened to sue the Commission if it granted Affluere's application or a separate application that had been submitted by Respondent Tennessee Fine Wines & Spirits, LLC (hereinafter "Total Wine"). J.A. 15-16, 28-29, 39, 81.

According to the Association, approving the applications would violate Tennessee's durational residency requirements for retail liquor licenses, which require that: an individual applying for issuance or transfer of a license have resided in the state for at least *two years* immediately preceding the application; and an individual applying to renew a license (which expires after one year[2]) have resided in the state for at least *ten consecutive years* in the past. Tenn. Code Ann. § 57-3-204(b)(2)(A). For corporate applicants, a license may not be issued, transferred, or renewed unless *every*

---

[2] Tenn. Code Ann. § 57-3-213(a).

"officer, director [and] stockholder owning any capital stock in the corporation" satisfies the durational periods applicable to individuals. Tenn. Code Ann. § 57-3-204(b)(3)(A), (B), (D). Given the interaction between the two-year application and ten-year renewal periods, the only practical way to open a retail liquor store—and keep it open after the first year—would be to wait to apply for a retail license until after nine years of Tennessee residency.

2. Faced with the Association's threat of a lawsuit if the Commission did not enforce durational residency requirements that were twice determined to be unconstitutional, the Commission deferred acting on Affluere's application, as well as Total Wine's application, for several months. J.A. 14, 20, 52, 64, 72, 80. It did so notwithstanding that the applications satisfied Tennessee's liquor licensing law in every other respect. J.A. 14, 39, 80-81, 95. Meanwhile, Doug Ketchum was unable to acquire full-time employment in Tennessee, did not have health benefits, and was unable to provide the level of care for his daughter that he and Mary would have been able to provide had they been able to start operating their own business. J.A. 64-65.

3. Finally, on September 21, 2016, the Commission's executive director (hereinafter "Director") filed a lawsuit in state court requesting a declaratory judgment regarding the constitutionality of Tenn. Code

Ann. § 57-3-204(b)(2)(A). J.A. 10-18. It named Affluere, Total Wine, and the Association as defendants. J.A. 10.[3]

The Association removed the case, J.A. 29, and the U.S. District Court for the Middle District of Tennessee re-aligned the parties. Given the Tennessee Attorney General opinions and the Director's indication that the Commission would have granted the licenses but for the Association's lawsuit, the court named Affluere and Total Wine as co-plaintiffs alongside the Director. J.A. 39, 45.

From that point, however, the Director's position changed. When Total Wine moved for partial summary judgment declaring the durational residency requirements unconstitutional, the Director *opposed* the motion and defended their constitutionality alongside the Association. *See* Pl. Clayton Byrd's Resp. to Mot. for Partial Summ. J. (ECF No. 73).

The district court granted Total Wine's motion, invalidating the requirements on dormant Commerce Clause grounds and enjoining their enforcement. Pet. App. 81a.[4] The court determined that, under *Granholm v. Heald*, 544 U.S. 460 (2005), "[t]he two-year . . . and ten-year . . . residency requirements applicable to both individuals and corporations discriminate against

---

[3] The complaint referred to Affluere as Kimbrough Fine Wine & Spirits, the name under which the Ketchums intended to do business. J.A. 10.

[4] The court did not reach Total Wine's alternative argument that the requirements violate the Privileges and Immunities Clause of Article IV, section 2. Pet. App. 80a-81a.

out-of-staters by creating a barrier to entering the Tennessee retail liquor market." Pet. App. 73a-74a. It rejected the Association's attempt to cabin *Granholm* to laws discriminating against the *producer* tier of a state's three-tier alcohol distribution system, explaining that "*Granholm* affirmed Commerce Clause principles that apply to the treatment of people and things beyond liquor producers and products." Pet. App. 71a.

Having determined that the requirements are facially discriminatory, the court next observed that there "ha[d] been no showing" that they "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Pet. App. 80a. The Director had "not offer[ed] the Court any concrete evidence" to justify the discrimination, and the court itself "fail[ed] to see how the retailer residency requirements even assist Tennessee to achieve a higher degree of oversight, control, and accountability over those involved in the ownership, management, and control of licensed retail premises." Pet. App. 78a, 80a.

4. Following the district court's decision enjoining the requirements, the Commission issued Affluere a license. *See* Minutes 1-3. Although the Ketchums were Tennessee residents at that point, they still did not satisfy the two-year durational period, and the Commission did not explain what would happen to Affluere's license, or the ability to renew it, "in the event [the district court's] ruling was reversed." *Id.* at 2.

5. The Association appealed, and the Director largely ceded defense of the durational residency requirements to the Association at the Sixth Circuit. Although he filed a brief defending the requirements, *see* Br. Appellee Clayton Byrd, ECF No. 30, he waived oral argument, allowing the Association to advocate the state's position. Order Granting Mot. to Waive Argument (ECF No. 52-1).

The Sixth Circuit affirmed the district court's judgment. Pet. App. 2a. It, too, held that "*Granholm* did not limit its application of the Commerce Clause to alcoholic-beverages laws regarding producers." Pet. App. 16a. Rather, *Granholm* "focused on a general Commerce Clause principle—the prohibition of discrimination against out-of-state economic interests." Pet. App. 17a. Thus, "regardless of the Twenty-first Amendment, 'state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.'" Pet. App. 19a (quoting *Granholm*, 544 U.S. at 487).

According to the court, however, the Twenty-first Amendment might nevertheless "immunize[ ]" the durational residency requirements from Commerce Clause scrutiny. Pet. App. 24a. To decide whether it did, the court "examine[d] 'whether the interests implicated by [the] state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" Pet. App. 24a (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-76 (1984)). The court determined that the regulation could not prevail, as its

durational residency requirements "do not relate to the flow of alcoholic beverages within the state," but rather "regulate the flow of individuals who can and cannot engage in economic activities." Pet. App. 27a. Although "[t]he Twenty-first Amendment gives a state the power to oversee the alcoholic-beverages business," the court held, "it does not give a state the power to dictate where individuals live." Pet. App. 27a.

Finally, the court noted that neither the Director nor the Association had argued that a reasonable, nondiscriminatory alternative was unavailable to achieve Tennessee's goals. Pet. App. 32a-33a. In that light, it held the requirements unconstitutional. Pet. App. 38a-39a.

Judge Sutton dissented in part. While he agreed that Tennessee's "application of the residency requirement to 100% of a retailer's stockholders," as well as "its imposition of a ten-year residency requirement for renewal of a license," were unconstitutional, he opined that the two-year requirement was permissible as it applied to individual applicants and to the officers and directors of corporate applicants. Pet. App. 54.

6. The Director has neither petitioned for certiorari nor filed a merits brief in this Court. Rather, he has allowed the Association—a lobbying organization for retail liquor-store owners—to stand in the state's shoes before the Court. *See* Letter from Herbert Slatery III, Tenn. Att'y Gen., to Scott Harris, Clerk, U.S. S. Ct. (Nov. 13, 2018).

SUMMARY OF THE ARGUMENT

Notwithstanding the Twenty-first Amendment, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald*, 544 U.S. 460, 487 (2005). Under that principle, a state alcohol law that discriminates against interstate commerce "face[s] 'a virtually *per se* rule of invalidity'" and will survive only if the state proves the regulation "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

The discriminatory nature of Tennessee's durational residency requirements is obvious. By denying all but longtime Tennessee residents the right to sell liquor in the state, Tennessee has erected a barrier that protects its own residents against competition from residents of other states. The Association does not dispute this discrimination, nor does it attempt to carry its burden of sustaining the law. Instead, it asserts that the Twenty-first Amendment neuters the nondiscrimination principle, rendering it inapplicable to virtually all state alcohol regulation except that which discriminates against out-of-state *products*. According to the Association, "[s]tates may regulate the in-state sale of alcohol 'unfettered by the Commerce Clause,' provided 'they treat liquor produced out of state the same as its domestic equivalent.'" Pet'r's Br. 24 (quoting *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), and *Granholm*, 544 U.S. at 489).

The Twenty-first Amendment gives the states no such power. This Court's decisions in *Granholm* and its predecessor, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), endorsed the nondiscrimination principle across all aspects of alcohol regulation, and the Association's attempts to cabin the holdings of these cases is baseless. In neither case did this Court differentiate discrimination against out-of-state products from discrimination against out-of-state services or residents. And in neither case did the Court suggest the latter was authorized by the Twenty-first Amendment.

Nor are Tennessee's durational residency requirements somehow "saved" by virtue of being an exercise of the state's "core" Twenty-first Amendment powers. For one thing, this Court in *Granholm* abandoned any adherence to a "core concerns," or "core powers," test that it might have previously followed in the dormant Commerce Clause context. And even if such a test were still applicable, Tennessee's requirements are not an exercise of any such "core" Twenty-first Amendment power.

Tennessee's durational residency requirements, moreover, do not discriminate against out-of-state residents only—they also discriminate against newly-arrived residents of Tennessee itself, such as the Ketchums. Long-term Tennessee residents—those having resided in the state longer than two years—may own a retail liquor business, but residents without two years' tenure in the state may not. Moreover, even after a new resident satisfies the initial two-year period and is able to secure a license, it expires after one year, and

she may not renew it until she has resided in the state for *ten* years. Such discrimination against newly-arrived residents—*particularly* in their ability to own and operate a business—is prohibited by the Privileges or Immunities Clause of the Fourteenth Amendment.

Both the majority and dissenting justices in this Court's seminal case concerning that clause—the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)—recognized that the clause protects a newly-arrived resident's right to be treated equally in her new state of residence. So, too, did the Court in *Saenz v. Roe*, 526 U.S. 489 (1999), in which it invalidated a one-year residency requirement for full welfare benefits in California.

If the Privileges or Immunities Clause protects the right of a newly-arrived resident to be treated equally in the receipt of welfare benefits, it surely protects her right to be treated equally in the pursuit of a livelihood. History supports this conclusion, demonstrating that the original public understanding of the clause was that it would protect the right of the freedmen (and their white Northern supporters) to migrate in connection with a livelihood and be treated equally in their new states of residence.

Finally, invalidating Tennessee's durational residency requirements will not, as the Association contends, undermine the "federalist values inherent in the Twenty-first Amendment." Pet'r's Br. 47. Rather, enforcing the Privileges or Immunities Clause to protect a newly-arrived resident's right to earn a living on

equal terms with long-term residents will promote the very values of federalism that justify affording states discretion to regulate alcohol in the first place.

ARGUMENT

I. The Twenty-First Amendment Does Not Empower Tennessee To Impose Durational Residency Requirements For Retail Liquor Licenses

The Association does not contend that Tennessee's durational residency requirements survive ordinary Commerce Clause scrutiny, under which "[s]tate laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (quoting *Granholm*, 544 U.S. at 476). Therefore, the only question for this Court is whether the Twenty-first Amendment empowers the state to impose those requirements notwithstanding their discriminatory character. *See* Pet'r's Br. 17.

The Association offers two arguments as to why the Twenty-first Amendment supposedly provides such authority. First, it maintains that the Twenty-first Amendment shields state alcohol laws from the Commerce Clause's nondiscrimination principle so long as the laws do not discriminate against out-of-state *products*. Pet'r's Br. 24-36. Alternatively, it maintains that Tennessee's two-year residency requirement is "saved"

because it is related to the state's "core" powers under the Twenty-first Amendment. Pet'r's Br. 37-44.

Both arguments fail. For one thing, neither this Court's Twenty-first Amendment precedent nor its Commerce Clause precedent differentiates between discrimination against out-of-state products and discrimination against sales of products by out-of-state residents (or businesses owned by out-of-state residents). Moreover, the Court has made clear that the "core" concerns (or powers) test does not apply to laws that discriminate against interstate commerce. And in any event, Tennessee's durational residency requirements cannot pass that test.

A. The Nondiscrimination Principle Applies To All State Alcohol Laws, Not Merely Those Regulating Out-Of-State Products

Application of the Commerce Clause's nondiscrimination principle does not turn on whether a law discriminates against alcohol products from other states, on one hand, or sales of alcohol products by residents of other states (or businesses owned by residents of other states), on the other. Rather, *Bacchus* and *Granholm* make clear that the principle applies across *all* aspects of alcohol regulation and that the Twenty-first Amendment does not authorize either type of discrimination.

Bacchus concerned a Hawaii alcohol excise tax scheme that discriminated in favor of certain locally-produced beverages. After concluding that the tax

scheme failed the nondiscrimination principle, the Court considered whether the Twenty-first Amendment nevertheless authorized the discriminatory treatment. 468 U.S. at 274. The Court concluded that it did not.

The Twenty-first Amendment, the Court held, did not "repeal the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Id.* at 275 (internal quotation marks omitted) (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964)). Both provisions, the Court stressed, "are parts of the same Constitution [and] each must be considered in light of the other." *Id.* (alteration in original) (quoting *Hostetter*, 377 U.S. at 332). The Commerce Clause, of course, "furthers strong federal interests in preventing economic Balkanization," the Court explained. *Id.* at 276. Meanwhile, "[t]he central purpose of" the Twenty-first Amendment "was *not* to empower States to favor local liquor industries by erecting barriers to competition." *Id.* (emphasis added). Yet Hawaii's discriminatory tax scheme did just that: it used "mere economic protectionism" to "promote a local industry." *Id.* "[B]ecause the tax violate[d] a central tenet of the Commerce Clause but [wa]s not supported by any clear concern of the Twenty-first Amendment," the Court rejected the state's argument that the tax scheme was authorized by the Twenty-first Amendment. *Id.*

Notwithstanding *Bacchus*'s broad statements regarding discrimination favoring "local liquor *industries*," the Association invites this Court to cabin the

decision to require adherence to the nondiscrimination principle only when states regulate liquor *products*. Pet'r's Br. 43. Nothing in the Court's reasoning, however, so much as hints at this limited interpretation. Rather, the Court spoke broadly of the evils of "economic Balkanization," "economic protectionism," and discrimination to promote "a local industry"—evils that can, and do, surface in areas far beyond the regulation of physical goods.

Moreover, even if *Bacchus* did leave the door open to the Association's narrow reading, *Granholm* shut it. *Granholm* involved a challenge to laws in two states that prohibited or severely restricted the ability of out-of-state, but not in-state, wineries to ship wine directly to in-state consumers. The Court had "no difficulty" concluding the statutes violated the Commerce Clause: by "their own terms," they violated the nondiscrimination principle. *Granholm*, 544 U.S. at 475, 476.

As in *Bacchus*, however, the states maintained that the Twenty-first Amendment authorized the laws, notwithstanding their discriminatory character. This Court rejected that contention. After reviewing the relevant history and concluding that the "aim of the Twenty-first Amendment was to allow states to maintain an effective and *uniform* system for controlling liquor," *id.* at 484 (emphasis added), the Court held unequivocally that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487. Under that principle, the Court explained, it had generally invalidated, "without further inquiry," statutes that "discriminate[] against

interstate commerce" or have the "effect" of "favor[ing] in-state economic interests over out-of-state interests." *Id.* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

The Court then cited *Bacchus* as an "example of this proposition," one that "forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." *Id.* at 487-88. What's more, the Court cited approvingly Justice Scalia's concurrence in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), in which he opined that a Connecticut statute's "invalidity [wa]s fully established by its facial discrimination against interstate commerce." *Id.* at 344 (Scalia, J., concurring in part and concurring in judgment). This "discriminatory character *eliminate*[*d*] the immunity afforded by the Twenty-first Amendment." *Id.* (emphasis added).

Despite this Court's categorical rejection of the states' argument in *Granholm*, the Association maintains that the decision was extraordinarily narrow. It insists that *Granholm* bars only "laws that discriminate against out-of-state *goods*" and that it otherwise affords states "*complete control* over the structure of their in-state alcohol-distribution systems." Pet'r's Br. 44 (emphasis added).

In support of its interpretation, the Association focuses on a single paragraph of *Granholm* in which the Court stressed that the unconstitutionality of the three-tier system for alcohol distribution, which the Court had previously recognized as "'unquestionably

legitimate,'" "does not follow from our holding." *Granholm*, 544 U.S. at 488, 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). The Court then noted that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489.

It is this last sentence on which the Association hangs its myopic reading of *Granholm*. "So long as 'they treat liquor produced out of state the same as its domestic equivalent,'" the Association insists, "states may regulate the in-state sale of alcohol unfettered by the Commerce Clause." Pet'r's Br. 55 (internal quotation marks and citations omitted). But no matter how many times the Association quotes this sentence—*see id.* at 6, 7, 13, 21, 23, 24, 41, 44, 45, 55—it does not do the work that the Association claims it does.

For one thing, the paragraph from which the Association draws the sentence begins with this Court's assurance that the constitutional invalidity of the three-tier system "does not follow from our holding." *Granholm*, 544 U.S. at 488. That "holding" is that the Commerce Clause's nondiscrimination principle applies in the context of alcohol regulation—period. *Id.* at 487. The remainder of the paragraph is simply an explanation of how that holding applies in the factual circumstances of *Granholm*—not a limitation or qualification of the holding itself. Pet. App. 23a ("[*Granholm*] discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of 'producers' simply because *Granholm* involved

statutes addressing that step in the three-tier system.").

The sentence that the Association repeatedly invokes, moreover, gives no indication that the Twenty-first Amendment protects laws that discriminate against out-of-state retailers or wholesalers. Pet. App. 23a. If, as the Association contends, the Court had intended to draw a distinction between those tiers and producers, it presumably would have offered some rationale for doing so—or at least acknowledged that it *was* doing so. But it did not. *See Lebamoff Enters., Inc. v. Rauner*, No. 17-2495, 2018 WL 6191351, at *5 (7th Cir. Nov. 28, 2018) ("We will not assume that the Supreme Court, without saying so directly, announced a new bright-line rule creating different constitutional treatment for the producer tier, on the one hand, and the lower two tiers, on the other.").

Moreover, the nondiscrimination principle itself does not distinguish between discrimination against producers (or products) and discrimination against sellers (or sales). Outside of the alcohol context, this Court has applied the principle to invalidate discrimination *identical* to that effected by Tennessee's law—that is, discrimination against out-of-state ownership of in-state sellers. *Lewis v. BT Invest. Managers, Inc.*, 447 U.S. 27, 31, 49 (1980) (invalidating law that prohibited banks and trust companies with principal operations outside of Florida from "owning or controlling a business within the State that sells investment advisory services to any customer"); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)

(holding nondiscrimination principle prohibits discrimination "in favor of local . . . investment").

Finally, *Granholm*'s observation that the Court had previously recognized the constitutional legitimacy of the three-tier system says nothing about whether every aspect of a state's implementation of that system will pass constitutional muster. Inasmuch as the three-tier system has an essential aspect, it is the prohibition of vertical integration, *see Granholm*, 544 U.S. at 466, and there is nothing inherently discriminatory about such a prohibition. By calling the three-tier system "legitimate," then, the Court was merely explaining that there is no necessary tension between the system and the nondiscrimination principle. It was not giving its imprimatur to every conceivable regulation, no matter how discriminatory, adopted by a state that regulates alcohol through a three-tier system.

B. After *Granholm*, Discriminatory Laws Are Not Saved By The "Core" Concerns Of The Twenty-First Amendment

The Association offers an alternative, equally unavailing, argument for upholding Tennessee's two-year residency requirement: that it is "saved" because it was enacted pursuant to a "core" power of the Twenty-first Amendment. Even if the requirement discriminates, the Association maintains, and even if the nondiscrimination principle applies beyond products and producers, the requirement is still constitutional because of

its close relationship to the "core" concerns of the Twenty-first Amendment. The Association is mistaken: under *Granholm*, if a regulation is discriminatory, there is no inquiry into the "core" concerns of the Twenty-first Amendment. Even if there were, however, there is no relationship between Tennessee's durational residency requirements and "core" Twenty-first Amendment concerns.

The "core" analysis that the Association advocates originates in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in which this Court held that the federal Sherman Act pre-empted a California law mandating retail price maintenance in the liquor industry. In so holding, the Court explained that "there is no bright line between federal and state powers over liquor." *Id.* at 110. "The Twenty-first Amendment," the Court noted, "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* But while "States retain substantial discretion to establish other liquor regulations," it added, "those controls may be subject to the federal commerce power in appropriate situations." *Id.* "The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" *Id.* (quoting *Hostetter*, 377 U.S. at 332).

The Court reaffirmed this case-by-case balancing approach in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), another pre-emption case that pitted Oklahoma's ban on advertisements of alcoholic beverages

against the FCC's regulation of cable operators. Oklahoma argued that even if its ban was invalid under normal pre-emption analysis, "the Twenty-first Amendment rescue[d] the statute from pre-emption." *Id.* at 711-12. In rejecting that argument, the Court asked "whether the interests implicated by [the] state regulation [we]re so closely related to the powers reserved by the Twenty-first Amendment that the regulation m[ight] prevail, notwithstanding that its requirements directly conflict[ed] with express federal policies." *Id.* at 714. The Court performed the balancing analysis described in *Midcal* to answer that question and concluded that "the Twenty-first Amendment d[id] not save the regulation from pre-emption." *Id.* at 716.

Although *Midcal* and *Capital Cities* involved direct conflicts between state liquor laws and federal legislation or regulation, their balancing approach found its way into dormant Commerce Clause jurisprudence, primarily through a pair of quotations of the opinions in *Bacchus*. *See Bacchus*, 468 U.S. at 275-76. This ad-hoc balancing of state and federal interests is now "commonly referred to as the 'core concerns' test." *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003). Lower courts, including the Sixth Circuit in this case, have continued to apply the test in Twenty-first Amendment cases to determine whether challenged laws that clearly violate the dormant Commerce Clause can nevertheless be "saved." *See* Pet. App. 23a-24a.

This is a mistake. *Granholm* indicates that the Twenty-first Amendment can never "save" a law that both (1) discriminates against interstate commerce

and (2) fails the strict review applicable to such laws under this Court's usual dormant Commerce Clause precedent. *See Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 21 (1st Cir. 2010) ("[I]t is unclear that this balancing test survives *Granholm*."); *Brooks v. Vassar*, 462 F.3d 341, 361 (4th Cir. 2006) (Goodwin, J., concurring in part and dissenting in part) ("I read *Granholm* as requiring us to apply the same dormant Commerce Clause analysis to discriminatory liquor laws that we apply to other discriminatory laws.").

Indeed, after *Granholm* concluded that the direct-shipment regulations at issue there discriminated against interstate commerce, 544 U.S. at 476, the Court did not consider, in accordance with *Capital Cities*, "whether the interests implicated by [the] state regulation[s]" were "so closely related to the powers reserved by the Twenty-first Amendment that the regulation[s] m[ight] prevail." *Capital Cities*, 467 U.S. at 714. Nor did the Court attempt to "reconcile," in accordance with *Midcal*, state and federal interests after "careful scrutiny of those concerns in [the] 'concrete case'" before it. *Midcal*, 445 U.S. at 110. Rather, the Court examined the history of the Twenty-first Amendment and concluded *categorically* that the amendment provides no protection to laws that discriminate against interstate commerce. *See Granholm*, 544 U.S. at 486, 487 (holding that "the Twenty-first Amendment does not supersede other provisions of the Constitution" and that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause"). This is an entirely different mode of analysis than the

Court adopted in *Midcal* and *Capital Cities*. *See id.* at 524 (Thomas, J., dissenting) (observing that *Granholm* did not apply the "core concerns" test).

Moreover, *Granholm* subjected the direct-shipment laws to the strict, searching review ordinarily applied to laws that discriminate against out-of-state commerce, and it concluded that the states had failed to demonstrate that their asserted interests—which included prevention of underage drinking—could not be adequately served by nondiscriminatory means. *Id.* at 489-91. A state's interest in preventing underage drinking is a subset of its interest in temperance, which this Court has recognized as a core, or central, concern of the Twenty-first Amendment. *Bacchus*, 468 U.S. at 276. *Granholm* thus makes clear that when a state alcohol regulation discriminates against interstate commerce, the proper approach for determining whether that discrimination is a permissible means of achieving the state's interest—even its core Twenty-first Amendment interest—is through the same scrutiny that applies to *all* laws that discriminate against interstate commerce.

In this regard, *Granholm* constituted a departure from *Midcal* and *Capital Cities*—and, to some extent, even *Bacchus*. But that departure was justified. History has repeatedly demonstrated that states will not hesitate to engage in "low-level trade war[s]" unless the judiciary stands ready to vigorously enforce the Commerce Clause's nondiscrimination principle. *Granholm*, 544 U.S. at 473. In the face of persistent and creative state efforts to protect local economic interests,

enforcement of that principle is the surest means of preventing the economic Balkanization that the Framers sought to avoid. *Id.* at 472.[5]

C. Even If The "Core" Concerns Test Still Applies, Tennessee's Durational Residency Requirements Fail It

Even if some form of Twenty-first Amendment "saving" test survived *Granholm*, the Sixth Circuit correctly concluded that no Twenty-first Amendment interests are implicated by Tennessee's durational residency requirements. The Association suggests three ways that the two-year requirement might potentially advance an interest in temperance, but the proposed rationales do not withstand even minimal scrutiny.[6]

---

[5] Whether the core concerns test still applies to state liquor laws that merely burden, rather than discriminate against, interstate commerce remains an open question. *Cf. Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 462 (7th Cir. 2012) (Hamilton, J., concurring in judgment) (arguing Twenty-first Amendment precludes Commerce Clause scrutiny of laws burdening interstate commerce in a nondiscriminatory fashion).

[6] Some amici argue generally that residency requirements facilitate "orderly market conditions," citing *North Dakota*, 495 U.S. 423, 432. Yet *North Dakota* "did not state that 'ensuring orderly market conditions' was a core Twenty-first Amendment regulation." *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1020 (W.D. Mo. 1998). Moreover, no amicus provides any real explanation of what "orderly market conditions" means or how durational residency requirements further that interest. *See Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002) ("As for 'ensuring orderly markets,' we are not sure what that phrase means, but it certainly

First, the Association claims the requirement ensures that public officials who review applications for liquor licenses, and who might lack adequate "investigatory resources," will have sufficient knowledge about applicants' qualifications. Pet'r's Br. 48. The only relevant "qualification" in the statute, however, is that an applicant not have been convicted of a felony in the prior ten years. Tenn. Code Ann. § 57-3-208(b)(2). Moreover, the statute requires the *applicant* to secure and pay for a criminal background check, *id.*, so the officials' "investigatory resources" are irrelevant.

Second, the Association claims the requirement, in Judge Sutton's words, "increases the odds 'that [those who sell liquor] will be knowledgeable about the community's needs and committed to its welfare.'" Pet'r's Br. 48-49. The Association attempts to concretize Judge Sutton's suggestion, claiming that a longtime resident is (1) more likely to know which members of a community are underage or alcoholics, and (2) less likely to sell to either. Pet'r's Br. 49. The time a person has resided in a particular community, however, bears little relation to her knowledge of any special community needs germane to alcohol sales, and it bears no relation to her commitment to refuse liquor sales to those who should not have it. Yet even if the Association were correct, there is a profound mismatch between this hypothetical interest and the actual requirements of the statute. After all, the statute does not require that persons *selling* liquor in a licensed retail establishment be

---

does not mean discrimination in a way that effectively forecloses out-of-state firms from the Florida market.").

longtime residents of the *community*—it requires that *owners* of the establishment be longtime residents of the *State of Tennessee*. Even by the Association's own logic, there is no reason to expect that a corporation's owners who reside in Knoxville will be uniquely knowledgeable about the special needs of a community in Memphis.

Finally, the Association claims the residency requirement promotes temperance by reducing the supply of retail alcohol in the state. Pet'r's Br. 50-51. It concedes, with remarkable understatement, that this effect is "indirect." Indeed. There are countless straightforward ways that a state can limit the retail availability of alcohol without discriminating against residents of other states. In fact, Tennessee *already* empowers local governments to "limit . . . the number of licenses issued within their jurisdictions." Tenn. Code Ann. § 57-3-208(c). Thus, the state need not—and may not—resort to economic protectionism to "indirectly" advance its interests.

The connection between temperance and durational residency requirements is so attenuated that Tennessee's statute would not satisfy even rational-basis scrutiny. But the "saving" test of *Midcal* and *Capital Cities* is far more stringent. The Court did not ask in those cases whether there was some conceivable connection between the challenged regulation and the interests underlying the Twenty-first Amendment. Rather, it asked "whether the interests implicated by [the] state regulation [we]re *so closely related* to the powers reserved by the Twenty-first Amendment that

the regulation m[ight] prevail, notwithstanding that its requirements directly conflict[e]d with express federal policies." *Capital Cities*, 467 U.S. at 714 (emphasis added). Tennessee's durational residency requirements fail this test, and for the same reasons, fail the far stricter scrutiny applicable to laws that discriminate against interstate commerce.[7]

II. Tennessee's Durational Residency Requirements Violate The Privileges Or Immunities Clause Of The Fourteenth Amendment

The durational residency requirements also violate the Privileges or Immunities Clause of the Fourteenth Amendment, and the Court should affirm the judgment below on this alternative ground if it disagrees with the reasoning on which that judgment rests. In fact, the last time this Court confronted a durational residency requirement, it did precisely that: in *Saenz v. Roe*, 526 U.S. 489 (1999), the Court affirmed, on Privileges or Immunities Clause grounds, a judgment that had invalidated the requirement under the Equal Protection Clause.

Moreover, this Court's Privileges or Immunities Clause precedent, while admittedly slim, squarely holds that the clause protects the right of newly-arrived state residents to be treated on equal terms with old-timers. It was on this very ground that the Court

---

[7] For the reasons expressed in the Brief of Total Wine, this Court should invalidate Tennessee's residency scheme in its entirety, including its ten-year durational requirement.

invalidated California's one-year durational residency requirement for welfare benefits in *Saenz*. *Id.* at 502-11. If the clause protects newly-arrived residents against such discrimination in the disbursement of welfare benefits, it surely protects them against such discrimination in their freedom to earn a living, as the Ketchums are trying to do in Tennessee.

In fact, the original public understanding of the clause was that it would prohibit laws like the "Black Codes," which were passed by Southern states in the wake of the Civil War to restrict the mobility of the freedmen and keep them "in their place." The clause was designed in large measure to ensure that these newly-freed slaves (and all Americans) would be free to travel in pursuit of—and in pursuing—an honest living.

Finally, enforcing the clause to protect a newly-arrived resident's right to earn a living on equal terms with longer-term residents would promote the very federalism values that justify affording states discretion to regulate alcohol in the first place.[8]

---

[8] Affluere's entitlement to a retail liquor license depends on the duration of residency of Doug and Mary Ketchum, its owners. The Ketchums are "citizen[s] of the United States" under the Privileges or Immunities Clause, and they risk losing their company's license—which was issued when they had resided in the state for only nine months—if the durational residency requirements are upheld. Thus, Affluere's entitlement to the license is "inextricably bound up" with the Ketchums' right to be treated equally in their new state of residence, and Affluere is "as effective a proponent of the right" as the Ketchums themselves. *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976); *see also Kowalski v. Tesmer*, 543 U.S. 125,

A. This Court Can And Should Reach The Privileges Or Immunities Issue

If this Court determines that the Sixth Circuit's reasoning was incorrect, it should nevertheless affirm that court's judgment on an alternative ground: the Privileges or Immunities Clause of the Fourteenth Amendment. "The question before an appellate Court," after all, "is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *McClung v. Silliman*, 19 U.S. 598, 603 (1821). The Court, moreover, may reach this issue despite its not being raised below. *E.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009) (reaching issue first raised in respondent's merits brief in this Court); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (same). In fact, in *Saenz*, this Court affirmed, on Privileges or Immunities grounds not developed below, a Ninth Circuit judgment that had invalidated a one-year durational residency requirement on other grounds.

The same course is warranted here. As discussed below, Affluere's Privileges or Immunities argument is supported (indeed, dictated) by the law and record, and affirming on that ground would not expand the scope of relief the Sixth Circuit granted. *See Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the

---

129-30 (2004); *cf. Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 77-78 (1920) (invalidating, in case brought by corporation, statute that violated the Article IV Privileges and Immunities rights of its employees).

asserted ground would not expand the relief which has been granted."). Moreover, the Privileges or Immunities issue is "predicate to an intelligent resolution of the question presented" and is therefore "fairly included within" it. *Caterpillar Inc.*, 519 U.S. at 75 n.13 (internal quotation marks omitted). The question presented, after all, asks "[w]hether the Twenty-first Amendment empowers States" to impose durational residency requirements for retail liquor licenses. Pet. i; *see also* Pet'r's Br. 17 (stating the "only issue before the Court is whether the Twenty-first Amendment permits states to impose two-year durational-residency requirements"). The predicate to that question is that states would *not* have the power to impose such requirements in the absence of the Twenty-first Amendment, and that may be true for Commerce Clause *or* Privileges or Immunities Clause reasons.

B. This Court's Privileges Or Immunities Precedent Protects A Newly-Arrived Resident's Right To Be Treated On Equal Terms With Longtime Residents

This Court's Privileges or Immunities precedent is admittedly slim, but it squarely recognizes the right of a resident newly arrived in a state to be treated on terms equal with those who have resided there longer. Both the majority *and* dissenting opinions in the Court's seminal Privileges or Immunities Clause decision, the *Slaughter-House Cases*, recognized that the clause protects such a right. And while the Court had little to say regarding the clause over the next century

and a quarter, its last significant exposition of the clause, *Saenz v. Roe*, reaffirmed *Slaughter-House*'s holding that the clause protects this right.

In *Slaughter-House*, this Court was "called upon for the first time to give construction to" the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment. 83 U.S. (16 Wall.) at 67. The Court began that construction with an overview of the circumstances leading up to the amendment's adoption. "[N]otwithstanding ... the abolition of slavery," it noted, Southern states had adopted laws—the Black Codes—"which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Id.* at 70. This led to "the conviction that something more was necessary in the way of constitutional protection." *Id.* That "something more" was the Fourteenth Amendment.

The first section of the amendment, the Court noted, "opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States." *Id.* at 72. "No such definition was previously found in the Constitution," and the "Dred Scott case" had held "that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States." *Id.* at 73. "This decision ... had never been overruled," the Court noted, and consequently "all the negro race who had recently been made freemen" by the Thirteenth Amendment "were still, not only not citizens, but were incapable of

becoming so by anything short of an amendment to the Constitution." *Id.* "To remove this difficulty," and "to establish a clear and comprehensive definition of . . . citizenship of the United States, and also citizenship of a State, the first clause of the first section"—the Citizenship Clause—"was framed." *Id.*

The Court noted that the next clause of the amendment—the Privileges or Immunities Clause—"speaks only of privileges and immunities of citizens *of the United States*." *Id.* at 74 (emphasis added). According to the Court, such rights of national (as opposed to state) citizenship exclude "nearly every civil right for the establishment and protection of which organized government is instituted." *Id.* at 76. Only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws" are protected by the Privileges or Immunities Clause. *Id.* at 79.

"But lest it should be said that no such privileges and immunities are to be found," the Court proceeded to identify some. *Id.* Among them is that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." *Id.* at 80.

The dissenting justices criticized the majority's "much too narrow" construction of the clause. *Id.* at 129 (Swayne, J., dissenting). Significantly for this case, however, they agreed with the majority that one of the rights the clause protects is the right of a newly-arrived

resident of a state to be treated equally with longer-term residents. As Justice Bradley explained, "[a] citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen." *Id.* at 112-13 (Bradley, J., dissenting). Justice Field agreed, explaining that the clause "protect[s] . . . every citizen of the United States against" legislation that "discriminat[es] . . . against him in favor of others . . . resid[ing] in the same . . . State[ ]." *Id.* at 100-01 (Field, J., dissenting).

In the century following *Slaughter-House*, this Court invalidated durational residency requirements for impermissibly discriminating against newly-arrived residents of a state. *E.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (invalidating one-year requirement for free medical services); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating one-year requirement to vote in state elections); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating one-year requirement for welfare benefits). In so doing, however, the Court relied on the Equal Protection, rather than Privileges or Immunities, Clause, despite the common ground regarding the latter in *Slaughter-House*.

Finally, in 1999, this Court relied on the Privileges or Immunities Clause to invalidate a one-year durational residency requirement for full welfare benefits in California. In *Saenz v. Roe*, the Court eschewed the equal protection grounding of its earlier durational residency decisions. "What is at issue in th[e] case," the Court explained, is "the right of the newly arrived

citizen to the same privileges and immunities enjoyed by other citizens of the same State"—a right "plainly" protected in the very language of the Citizenship and Privileges or Immunities Clauses. 526 U.S. at 502, 503. "[I]t has always been common ground," the Court noted, that the clause protects the right of the newly arrived resident to be treated equally in her new state of residence, citing, as evidence, Justice Miller's *Slaughter-House* majority opinion and Justice Bradley's dissent. *Id.* at 503-04. "That right," the Court added, "is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States." *Id.* at 502.[9]

Chief Justice Rehnquist, in an opinion joined by Justice Thomas, dissented in *Saenz*. On one hand, he agreed that the Privileges or Immunities Clause prohibits a state from discriminating against the rights of newly-arrived residents. *See id.* at 513 (Rehnquist, C.J., dissenting) ("I agree with the proposition that a 'citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.'" (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 80)). At the same time, he believed that a state may use a one-year durational requirement to "test" the bona fides of claims to residence before it disburses "certain in-state *benefits*," such as welfare or

---

[9] In this regard, the right is an example of the "overlap" between rights of national and state citizenship. *See McDonald v. City of Chicago*, 561 U.S. 742, 853 (2010) (Thomas, J., concurring in part and concurring in judgment).

free medical care. *Id.* at 517 (emphasis added). States, he explained, must "retain the ability . . . to ferret out those who intend to take the privileges and run." *Id.* at 517. While the Chief Justice did not directly opine on whether a state could impose a durational residency requirement on a newly-arrived resident's ability to work or own a business as Tennessee has done, he stressed that California's requirement "ha[d] no effect whatsoever on" a newly-arrived resident's access to "employment . . . services." *Id.* at 520.

Justice Thomas authored a separate dissent (which Chief Justice Rehnquist joined), focusing on the original understanding of the Privileges or Immunities Clause. He drew heavily on the opinion of Justice Bushrod Washington riding circuit in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), concerning the "fundamental" rights protected by the Privileges *and* Immunities Clause of Article IV, section 2. Justice Thomas noted that "*Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment," and that "[w]hen Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed to *Corfield*, arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion." *Saenz*, 526 U.S. at 526 (Thomas, J., dissenting). "[T]heir repeated references to the *Corfield* decision," he reasoned, "supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities of citizens' were fundamental rights, rather

than every *public benefit* established by positive law." *Id.* at 527 (emphasis added). Accordingly, he rejected "the majority's conclusion—that a State violates the Privileges or Immunities Clause when it 'discriminates' against citizens who have been domiciled in the State for less than a year in the *distribution of welfare benefits*—[because it] appears contrary to the original understanding" of the clause. *Id.* (emphasis added). But just as Chief Justice Rehnquist had noted the distinction between discrimination in welfare benefits and discrimination in employment services, Justice Thomas noted that one of the "fundamental" rights recognized in *Corfield* is "[t]he right of a citizen of one state . . . to reside in any other state, for purposes of *trade, agriculture, [or] professional pursuits*." *Id.* at 525 (emphasis added) (quoting *Corfield*, 6 F. Cas. at 552).

Most recently, in *McDonald v. City of Chicago*, the Court was asked whether the Second Amendment is enforceable against the states through the Privileges or Immunities Clause. A plurality of the Court concluded that it is instead incorporated through the Due Process Clause, 561 U.S. at 791 (plurality), but Justice Thomas, providing a fifth vote for the Court's judgment, concluded that "the right to keep and bear arms is a privilege of American citizenship" protected by the Privileges or Immunities Clause. *Id.* at 806 (Thomas, J., concurring in part and concurring in judgment). In so concluding, he examined the history of the clause to discern its original public meaning. He determined that "the privileges and immunities of American citizenship . . . overlap to at least some extent with the

privileges and immunities traditionally recognized in citizens in the several States." *Id.* at 853. In that light, he saw "no reason to interpret the Privileges or Immunities Clause as putting the Court to the extreme choice of interpreting the 'privileges and immunities' of federal citizenship to mean either all those rights listed in *Corfield*, or almost no rights at all," as *Slaughter-House* suggests. *Id.* at 852. Although he did not elaborate on which rights fall within this overlap, the right of a citizen of one state to change her residence to pursue a living in another state, and to be treated equally therein, is one of them, embraced by both *Slaughter-House* and *Corfield*.

In short, this Court's Privileges or Immunities Clause precedent—from *Slaughter-House* to *Saenz*—protects the right of the newly-arrived resident of a state to be treated equally with longer-term residents. Whether one believes, like the *Slaughter-House* majority, that the clause protects only a handful of rights of national citizenship or, like the *Slaughter-House* dissent, a broader array of "fundamental" rights such as those identified in *Corfield*, Tennessee's requirement of two years' residency to secure, and ten years' residency to renew, a retail liquor license abridges a right that falls squarely within the clause's protection. And whether one believes that the clause prevents discrimination against the newly-arrived resident generally or, rather, only in her "trade, agriculture, [and] professional pursuits," *Corfield*, 6 F. Cas. at 552, it prevents the type of discrimination effected by Tennessee's law.

C. As Originally Understood, The Clause Protected The Right To Migrate In Connection With Employment

In fact, it would be perverse to conclude that the clause does *not* protect the newly-arrived resident in her pursuit of an honest living, because the original public understanding of the clause was that it would protect the ability of the newly-freed slaves—and all Americans—to travel in pursuing their own free labor.

1. The Right To Migrate In The Antebellum Period

"From the earliest days of American nationhood, a free citizen ha[d] been able to claim a right of geographical mobility." Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 Cornell L. Rev. 523, 548 (1997). Yet African Americans, on the very theory that they were not national citizens, were denied that right.

"In a single section of the Constitution"—Article IV, section 2—"the framers drew an explicit line between free labor and slave labor," affording mobility to the former and denying it to the latter. *Id.* The first clause of that section—the Privileges *and* Immunities Clause—guaranteed "[c]itizens" the right to travel to and reside in another state in the pursuit of a livelihood, *see Corfield*, 6 F. Cas. at 551-52, while the section's third clause, the Fugitive Slave Clause, guaranteed that a slave who escaped to a free state could be returned to bondage.

But what of *free* blacks? Could they avail themselves of Article IV's protection of the right to migrate "for purposes of trade, agriculture, [or] professional pursuits"? In the antebellum years, Southern states—and even some in the North—did not think so. They enacted myriad laws to prohibit or inhibit black movement in economic pursuits—from the Negro Seamen Acts under which more than 10,000 black sailors were jailed upon entering Southern ports, *see* W. Jeffrey Bolster, *Black Jacks* 199, 206 (1997), to the constitutional and statutory provisions prohibiting or penalizing free black migration in Indiana, Illinois, and Iowa, *see* Raymond T. Diamond, *National and Local Perspectives on States' Use of Criminal Law to Regulate Undocumented or Unauthorized Migration*, 12 Loy. J. Pub. Int. L. 375, 380-81 (2011).

These states were able to enact such restrictions on the movement of free blacks because the citizenship status of free blacks was uncertain, and the protections of Article IV's Privileges and Immunities Clause extend only to the "[c]itizens of each State." U.S. Const. art. IV, § 2. While abolitionists argued for the citizenship of blacks under the clause, their position was rejected in *Dred Scott v. Sandford*, which held that blacks, slave or free, were not citizens and therefore did not enjoy "the privileges and immunities of citizens" protected by Article IV, section 2. 60 U.S. (19 How.) 393 (1857).

"*Dred Scott* did not distinguish between privileges and immunities of citizens of the United States and

citizens in the several States, instead referring to the rights of citizens generally." *McDonald*, 561 U.S. at 822 (Thomas, J., concurring in part and concurring in judgment). "It did, however, give examples of what the rights of citizens were," *id.*, and among them was the right of citizens of a state "to enter every other State whenever they pleased" and "to sojourn there as long as they pleased." *Dred Scott*, 60 U.S. at 417.

According to Chief Justice Taney, "it cannot be believed that the large slaveholding States regarded [blacks] as included in the word citizens, or would have consented to a Constitution which might" afford blacks this right. *Id.* at 416. He "was clearly upset by the possibility that if blacks were citizens of the United States, they would have the right to travel to other states, including Southern states, and, under Article IV, Section 2, would enjoy the privileges and immunities of citizens in those states." Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 Chi.-Kent L. Rev. 49, 56-57 (2007).

In an ironic—and perverse—way, Justice Catron's concurring opinion also placed the right of migration among those protected by Article IV, section 2. Dred Scott's claim for freedom rested in part on the Missouri Compromise: he maintained that his residence and work in territory that was free under the Compromise required his emancipation upon return to Missouri. The Court did not simply reject Scott's claim—it declared the Compromise itself unconstitutional. According to Justice Catron, the Compromise deprived slaveholders of *their* "rights, privileges, and immunities" because it

deterred their migration: it "refused the[ir] right to emigrate to" free territory "unless they left their most valuable and cherished property behind them." *Dred Scott*, 60 U.S. at 526, 529 (Catron, J., concurring). In this sense, Justice Catron anticipated this Court's later jurisprudence invalidating durational residency requirements that likewise deter migration. Balkin & Levinson, *supra*, at 83.

Thankfully, the debate over citizenship and the rights attendant to it did not end with *Dred Scott*. Almost immediately after the decision, Congress took up whether to admit Oregon to the Union as a state. Particularly problematic was a provision in the constitution approved by territorial voters that would restrict free black migration: "No free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside, or be within this State," and "the Legislative Assembly shall provide . . . for the punishment of persons who shall bring them into the State, or employ" them. Or. Const. of 1857, art. XVIII, § 4. Members of Congress who opposed Oregon's admission contended that this provision violated Article IV's Privileges and Immunities Clause, and the ensuing debate "foreshadowed the congressional debate over the rights of citizenship during Reconstruction." Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 726 (2003).

Among those opposing Oregon's admission was Representative John Bingham, future architect of the Fourteenth Amendment's Privileges or Immunities

Clause, who saw the state constitutional provision as abridging the right of free blacks to migrate. In an 1859 speech, he argued that free blacks were, by virtue of their citizenship in their respective states, also citizens of the United States, and that Article IV would be rendered "a mockery" if it did not "restrain each and every State from closing its territory . . . against citizens of the United States." Cong. Globe, 35th Cong., 2nd Sess. 984 (1859). He "den[ied] that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from enjoyment therein of the 'privileges and immunities' of a citizen of the United States." *Id.*

2. The Right To Migrate In The Early Postbellum Years

For a (very) short time after emancipation, things looked more promising for blacks. "[I]nnumerable Negroes left the plantations on which they had worked" and "sought work elsewhere on better terms." Robert Cruden, *The Negro in Reconstruction* 20 (1969).

"[A]s advocates of free wage labor," Northern Republicans "supported the right of freed people to move about the region, relocate into cities, and even leave the South in hopes of financial betterment." Douglas R. Egerton, *The Wars of Reconstruction* 179 (2014). "Southern landlords," however, "desired just the opposite." *Id.* They saw in abolition "potential economic disaster," as "[m]obile, free African-American laborers

replaced a docile, inexpensive supply of African-American slave labor." David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781, 786 (1998) [hereinafter *Interstate Migration*].

"In response to African Americans' new market power, planters lobbied their state and local governments to regulate the labor market to African Americans' detriment." David E. Bernstein, *Only One Place of Redress* 8 (2001). "Many localities in the summer of 1865 adopted ordinances limiting black freedom of movement, prescribing severe penalties for vagrancy, and restricting blacks' right to . . . engage in skilled urban jobs." Eric Foner, *Reconstruction* 198 (updated ed. 2014). "Labor policy, however, could hardly be settled by a series of local measures," and calls resounded for, as one Mississippi planter put it, "laws to require the negro to remain at one place and labour." *Id.*

The result of these calls was the Black Codes, adopted by one Southern state after another from late 1865 through early 1867. *See* Theodore Brantner Wilson, *The Black Codes of the South* 61-115 (1965). "The main functions" of the codes "were to replace the labor controls of slavery and to limit the mobility of the black labor force." William Cohen, *At Freedom's Edge* 28 (1991). "Southern states employed a variety of devices . . . to control this mobility." Davison M. Douglas, *Contract Rights and Civil Rights*, 100 Mich. L. Rev. 1541, 1544 (2002). They included vagrancy, enticement, and, later, emigrant-agent laws. *See* Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative*

or Competitive?, 51 U. Chi. L. Rev. 1161, 1163-64 (1984).

The most commonly known example is the "vagrancy" laws, which every former Confederate state save Tennessee and Arkansas passed in 1865 or 1866. William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. of S. Hist. 31, 47 (1976). "Vagrancy statutes essentially made it a crime to be unemployed or out of the labor force." Roback, *supra*, at 1168. They also "limited the amount of searching for new, more remunerative employment" that the freedmen could undertake, *id.*, because "traveling in search of a new job would leave them vulnerable to arrest for vagrancy." Bernstein, *Interstate Migration*, *supra*, at 787. And most of these laws permitted the "hiring-out" of offenders, who were then forced to perform unpaid labor. Cohen, *At Freedom's Edge*, *supra*, at 33. W.E.B. Du Bois summarized the impact on the ability of blacks to pursue a living:

> [T]o make the best labor contracts, Negroes must leave the old plantations and seek better terms; but if caught wandering in search of work, and thus unemployed and without a home, this was vagrancy, and the victim could be whipped and sold into slavery.

W.E.B. Du Bois, *Black Reconstruction* 167 (1935).

Like vagrancy laws, "enticement" laws were also designed to inhibit the freedmen from traveling in pursuit of a livelihood. They did so, however, by

criminalizing the conduct of employers, who were prohibited from "enticing" away laborers under contract with other employers. Roback, *supra*, at 1166. The laws were designed "to eliminate the danger of outside interference" from "the industrial enterprises of the North and to a lesser extent those of the South." Oscar Zeichner, *The Legal Status of the Agricultural Laborer in the South*, 55 Political Sci. Quarterly 412, 426 (1940).

Another, slightly later development aimed at inhibiting black migration was laws imposing hefty taxes or licensing fees on "emigrant agents"—persons who recruited freedmen for better wages and working conditions off their plantations.[10] "[E]migrant agents played a key role in encouraging and financing African-American migration within the United States." Bernstein, *Interstate Migration*, *supra*, at 781. Planters, however, "sought to discourage or effectively ban emigrant agents to inhibit a free market in labor," *id.* at 792, and Southern legislatures often enacted emigrant-agent laws in response to "wave[s] of outmigration." Roback, *supra*, at 1169 (footnotes omitted).

There were other types of laws enacted to keep blacks "in their place," figuratively and literally. In some areas, government prohibited blacks from traveling without a "pass" issued by their employer. *See* Foner, *supra*, at 198. Contract-enforcement statutes,

---

[10] Emigrant-agent laws were not contained in the original Black Codes but were lobbied for during the same period. Bernstein, *Interstate Migration*, *supra*, at 793. The first was enacted in 1870, three years before *Slaughter-House*. *Id.*

meanwhile, required blacks to enter into employment contracts and criminalized their breaking, thereby keeping blacks tied to plantations. *See id.* at 199-200. The common aim of all these laws was retention of "a coercive, race-based labor system by denying or restricting" the "freedom of travel" of blacks and "control over their own labor." James W. Fox Jr., *Publics, Meanings and the Privileges of Citizenship*, 30 Const. Comment. 567, 584 (2015).

3. The Joint Committee On Reconstruction

In light of these abuses, "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union." *McDonald*, 561 U.S. at 827 (Thomas, J., concurring in part and concurring in judgment). The Committee, which ultimately recommended adopting the Fourteenth Amendment, "justif[ied] its recommendation by submitting a report to Congress that extensively catalogued the abuses of civil rights in the former slave States." *Id.* It was replete with discussion of (1) abridgments of the freedmen's right to migrate in pursuit of a living and (2) Southern hostility toward newly-arrived residents from the North.

The vagrancy laws, in particular, received extensive treatment. The report provided general testimony about how they were being used to deny economic

opportunity to the freedmen,[11] but it also detailed specific instances where blacks were denied the opportunity to migrate in pursuit of a livelihood. For example, a witness from North Carolina testified that police in Gates County had "enforce[d] [the vagrancy] law on a person who had employment in Portsmouth and was earning her own living, who went out to get her own children." Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. pt. II, at 177. "She was seized before she had been there two days; her children refused to her, and under the vagrant act she was set to work on the old plantation without pay . . . as a slave." *Id.*

Another witness, from Mississippi, testified to similar abuses:

> The vagrant law of the State . . . is enforced by th[e] militia, and . . . the freedmen are not allowed to change their places at any time. I know of several instances where freedmen have gone from one county to another and made contracts, and were brought back by men . . . who whipped them and ordered them not to leave again . . . , even when they were under no contract with their former masters.

Id. pt. III, at 143. The report noted that, despite these abuses, federal agents continued to counsel the freedmen that they had the right to travel freely in pursuit of economic opportunity. *E.g.*, *id.* pt. IV, at 36 ("We told

---

[11] *E.g.*, Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. pt. II, at 35, 62, 126, 178, 243, 270 (1866); *id.* pt. III, at 70.

them . . . that they were free to go and come wherever they pleased, and to work for whomever they thought proper . . . .").

Also discussed were impediments and hostilities directed toward white Northerners migrating to the South. In some areas, for example, "persons coming to teach blacks were not permitted to rent a place either for a school or for their own personal occupation." *Id.* pt. II, at 143. In others, "any northern man coming down . . . to settle" would see "his cattle . . . poisoned, his hogs killed, and any improvements he made destroyed." *Id.* pt. II, at 179. While "emigrants from abroad would be kindly received," "emigrants from the north, or Union men, would be treated coldly or with indifference." *Id.* pt. III, at 27. As one witness testified, "I do not think it would be safe for northern men who have emigrated . . . if [federal] troops were withdrawn." *Id.* pt. I, at 119. The same was true for the freedmen. *Id.* pt. IV, at 123 (testifying that retention of federal troops was "necessary for the security of emigrants, freedmen, and capital").

4. Debate Over The Civil Rights Act Of 1866 And Other Pre-Fourteenth Amendment Legislation

Congress's first response to these abuses was not the Fourteenth Amendment, but rather the Civil Rights Act of 1866, 14 Stat. 27 (1866), which "is widely regarded as the precursor to the Fourteenth Amendment." *Saenz*, 526 U.S. at 526 n.6 (Thomas, J., dissenting).

Statements by members of Congress in the debates over the act (and contemporaneous legislation) reveal, like the Joint Committee's report, particular concern with the denial of the right to migrate that the freedmen and their Northern supporters were experiencing in the South.

The Act's author, Senator Lyman Trumbull, "began his discussion of the Civil Rights Bill with a reference to recent laws of Mississippi"—its Black Codes—and "declaring his intention 'to destroy all these discriminations.'" Foner, *supra*, at 244 (quoting Cong. Globe, 39th Cong., 1st Sess. 475 (1866)). Mississippi's laws, Trumbull explained, provided that "if any colored person, any free negro or mulatto, shall come into that State for the purpose of residing there, he shall be sold into slavery for life," and that "[i]f any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority." Cong. Globe, 39th Cong., 1st Sess. 474 (1866). Trumbull discussed, as well, Representative Samuel Hoar of Massachusetts, who, in 1844, had traveled to South Carolina to challenge that state's negro seaman act, only to be expelled from the state and thereby denied, according to Trumbull, his "privileges and immunities" under Article IV, section 2. *See id.* at 474, 475.

Trumbull then quoted Justice Washington's *Corfield* decision—including its recognition of "[t]he right of a citizen of one state to . . . reside in any other state,

for purposes of trade, agriculture, [or] professional pursuits," *Corfield*, 6 Fed. Cas. at 552—and stressed immediately thereafter that the freedman had "the right to travel, to go where he please[d]," and to "pursu[e] . . . happiness" when he got there. Cong. Globe, 39th Cong., 1st Sess. 475 (1866). Thus, Trumbull explained, his bill would "declar[e] all persons born in the United States to be citizens thereof" and "entitled to the rights of citizens," including, specifically, "the right to go and come at pleasure," as well as "to make contracts" and "acquire property." *Id.*

Representative James Wilson introduced the bill in the House and also discussed the right to migrate in connection with the pursuit of a livelihood. Stressing the bill's concern for the rights of "citizens of the United States," he asked rhetorically, "What are these rights?" *Id.* at 1118. Quoting Blackstone, he answered: "The right of personal liberty," which "'[c]onsists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct.'" *Id.*

Discussion of the right to migrate was common throughout the ensuing debates. Representative John Broomall, for example, noted that "rights and immunities of citizens were habitually and systematically denied" in the South—including, specifically, the "right of transit" and "right of domicile." *Id.* at 1263. And Senator Peter Van Winkle noted that "[t]he constitution of Indiana, and the laws of several States, forbid [blacks] to come within their borders for permanent residence,"

and that these "prohibitions would be of no effect if [blacks] [we]re citizens." *Id.* at 497.

Senator Trumbull's bill was enacted by the Congress, but President Johnson vetoed it, purportedly over concerns with its constitutionality. *Id.* at 1679-81. Congress overrode the veto, but not before Senator Trumbull again stressed the importance of the right to move to a new state and reside there on equal terms: "[W]hat rights do[es] [a] citizen[] of the United States have? . . . He has a right . . . to go into any state in the Union and to reside there, and the United States Government will protect him in that right." *Id.* at 1757.

Congress's contemporaneous consideration of other legislation, including Representative Samuel Shellabarger's "Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States," H.R. Res. 437, 39th Cong. (1866)—or "Privileges and Immunities Bill"—likewise reveals a concern with protecting the right to migrate in pursuit of a livelihood. This bill "was designed as a companion to the Civil Rights Act": whereas "[t]he Civil Rights Act generally protected individuals against discrimination under state law," the Privileges and Immunities Bill was designed to protect "against interstate discrimination." Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61, 116 (2011). The bill provided that

> every person, being a citizen of the United States shall, in right of such citizenship, be entitled, freely and without hindrance or molestation, to go from the State . . . of his or her residence, and to pass into and . . . remain and

> take permanent abode within each of the several States, . . . and therein . . . do and transact business . . . as fully as such rights and privileges are held and enjoyed by the other citizens of such State . . . .

H.R. Res. 437, § 1, 39th Cong. (1866).

As Shellabarger explained, the bill would protect those who "seek to or are attempting to go either temporarily or for abode from their own State into some other," and it would secure in such persons "those great international rights which are embraced in unrestrained and secure inter-State commerce, intercourse, travel, sojourn, and acquisition of abode." Cong. Globe, 39th Cong., 1st Sess. app. 293 (1866). The bill would make clear that these are rights of "national citizenship" that "cannot be taken away from any citizen of the United States by the laws of any State, neither from its own citizens nor from those coming in from another State." *Id.* While the bill failed because of constitutional objections, "the Fourteenth Amendment overcame this obstacle by elevating the Bill's main principle to a constitutional guarantee." Hamburger, *supra*, at 115.

Concern with protecting the right to migrate in pursuit of a livelihood also animated the Second Freedmen's Bureau Bill, which, as enacted, provided: (1) that all citizens enjoyed the "full and equal benefit of all laws . . . concerning personal liberty"; and (2) that Freedmen's Bureau officers would have judicial authority over "cases and questions concerning the free enjoyment of such immunities and rights." 14 Stat.

173, 176-77 (1866). Senator Trumbull maintained that the bill would "declare null and void all laws which will not permit the colored man to contract, . . . which will not permit him to buy and sell, and to go where he pleases." Cong. Globe, 39th Cong., 1st Sess. 322 (1866). Representative Donnelly, meanwhile, identified the vagrancy, enticement, and contract-enforcement laws of Southern states as evidence of the need for the bill. *Id.* at 588-89.

These "[s]tatements made by Members of Congress leading up to" the Fourteenth Amendment "can assist in th[e] process" of interpreting the amendment, because "they demonstrate the manner in which the public used or understood" the term "privileges or immunities." *McDonald*, 561 U.S. at 828 (Thomas, J., concurring in part and concurring in judgment). They make clear that the public understood that term to include the right to migrate to and reside in another state in pursuing a livelihood—and to be treated on equal terms in that pursuit.

5. Debate Over the Fourteenth Amendment

Congressional debate over the Fourteenth Amendment itself likewise evinces an understanding of the term "privileges or immunities" that encompassed the right to migrate in pursuit of a livelihood. This is hardly surprising, given that the Fourteenth Amendment was designed to provide: (1) a constitutional basis for the Civil Rights Act of 1866 and Second

Freedmen's Bureau Act, Jacobus tenBroek, *Equal Under Law* 201 (rev. ed. 1965), as well as (2) the protections envisioned by the Privileges and Immunities Bill, Hamburger, *supra*, at 119-20, 123.

Representative John Bingham submitted his first draft of the amendment to Congress in December 1865. In January 1866, he spoke in the House to explain its purpose. He quickly alluded to the Samuel Hoar affair, stressing that the guarantee of Article IV, section 2's Privileges *and* Immunities Clause "was utterly disregarded in the past by South Carolina when she drove . . . from her limits the honored representative of Massachusetts." Cong. Globe, 39th Cong., 1st Sess. 158 (1866). "I propose, with the help of this Congress and of the American people, that hereafter there shall not be any disregard of that essential guarantee of your Constitution in any State of the Union." *Id.*

Bingham's proposal was submitted to and revised by the Joint Committee on Reconstruction. When it was taken up again in late February 1866, it provided that Congress would have "power to make all laws . . . necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States." *Id.* at 1088. The surrounding debate confirms the understanding that such "privileges and immunities" included the right to travel to, and be treated equally in, a new state upon arrival.

For example, Representative Hiram Price stated that he "understood [the amendment] to mean simply this: if a citizen of Iowa or a citizen of Pennsylvania has

any business" in "South Carolina or Georgia, he shall have the same protection of the laws there that he would have had had he lived there for ten years." *Id.* at 1066. "[T]he intention," he added, "is to give the same rights, privileges, and protection to the citizen of one State going into another that a citizen of that State would have who had lived there for years." *Id.*

John Bingham confirmed Price's understanding. Speaking the same day, he explained the types of state conduct the amendment would prohibit and used, as an example, Oregon's constitutional bar on free blacks migrating to and taking up residence in the state. *Id.* at 1065. He also stressed, however, that it would "protect . . . loyal white citizens of the United States . . . against banishment" from Southern states. *Id.* The next day, Bingham emphasized that no state had the power "to withhold from any citizen of the United States within its limits . . . any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States." *Id.* at 1089.

Representative Giles Hotchkiss followed Bingham. "As I understand it," he stated, the "object in . . . proposing this amendment is to provide that no State shall discriminate between its citizens"—that is, "give one class of [its] citizens greater rights than it confers upon another" or "exclu[de] . . . any class of citizens in [the] State from the privileges which other classes

enjoy." *Id.* at 1095. Hotchkiss, however, did not think the amendment as then worded was sufficiently strong in this regard and accordingly urged postponement of its consideration until "we can devise some means whereby we shall secure those rights beyond a question." *Id.*

Bingham temporarily withdrew his amendment. "By the time the debates on the Fourteenth Amendment resumed, Bingham had amended his draft of § 1 to include the text of the Privileges or Immunities Clause that was ultimately adopted." *McDonald*, 561 U.S. at 831 (Thomas, J., concurring in part and concurring in judgment).

Senator Jacob Howard reported the new draft to the Senate. *Id.* He began his floor speech by recounting the work of the Joint Committee in investigating and reporting on abuses in the Southern states. *See* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). "One result of the[se] investigations," he explained was "the joint resolution for the amendment of the Constitution . . . now under consideration." *Id.*

Howard then turned to the Privileges or Immunities Clause specifically, linking it, in part, to the Privileges *and* Immunities Clause of Article IV, section 2. Quoting *Corfield*, he identified some of the "privileges and immunities" protected by the latter clause, including, specifically, "[t]he right of the citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, [or] professional pursuits." *Id.* (quoting *Corfield*, 6 Fed. Cas. at 552). The problem,

according to Howard, was that "there [wa]s no power given in the Constitution to enforce and carry out any of these guarantees." *Id.* "The great object of the first section of this amendment," he explained, was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. Three weeks after Howard's speech, Congress approved the amendment and proposed it to the states.

In short, Congress clearly understood the right to migrate in pursuit of a livelihood as among the "privileges" or "immunities" the amendment would protect. It understood the Privileges or Immunities Clause as a constitutional guarantee against laws like the Black Codes, which had denied the freedmen the right to migrate in search of a better living off the plantation. And it also understood that the clause would protect white Northerners who wished to migrate in search of economic opportunity—that it would "enable [them] to relocate to Southern states free from discrimination against 'Yankees' and 'carpetbaggers.'" Akhil Reed Amar, *Lost Clause: The Court Rediscovers Part of the Fourteenth Amendment*, New Republic, June 14, 1999, at 14.

6. Understanding Of The Ratifying Public

This understanding was not lost on the ratifying public. Newspapers widely reported Bingham's proposal and the speeches concerning it, and this coverage

"suggests public awareness of [the clause's] main contours." *McDonald*, 561 U.S. at 831 (Thomas, J., concurring in part and concurring judgment). As the ratification debates played out in the states, meanwhile, this understanding of the clause remained evident.

For example, in November 1866, The New York Times ran a pair of letters to the editor urging ratification. Alluding to *Corfield*, the first explained that "rights and privileges of a citizen of the United States" protected by the Privileges or Immunities Clause included "the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise." *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, at 2. The second recounted some of the abuses necessitating the amendment, including that a free black man "could not change his residence, nor travel at pleasure." *Political Affairs: National Politics: The Proposed Constitution Amend.—What it Provides*, N.Y. Times, Nov. 15, 1866, at 2.

Speeches urging ratification made similar points. Judge Noah Davis maintained that the amendment would protect the right "to migrate from one State to another" and "to do lawful labor and have its fruits." Michael Kent Curtis, *No State Shall Abridge* 140 (1986) (quoting *Proceedings of the Republican Union State Convention* 35 (Sept. 5, 1866)). A speaker in Ohio similarly explained that the amendment's first section would guarantee "the rights, immunities, and privileges of American citizenship" to all citizens, including

"the right of locomotion—the right to go where they please and live where they please, and own property where they please." James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 448 (1985) (quoting Dayton Daily Journal (Ohio), July 9, 1866, at 2, col. 1).

The public understood, too, that the clause would protect Northerners migrating to the South in pursuit of economic opportunity, as Representative Columbus Delano observed in an August 1866 speech:

> I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South when their opinions did not concur with the 'chivalry' of the Southern slaveholders .... And I know that we determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected ....

Speech of Hon. Columbus Delano, Cincinnati Commercial, Aug. 31, 1866, at 2, col. 3. A Philadelphia paper similarly assured readers that, upon ratification, there would be "freedom of interstate migration." Chester J. Antieau, *The Original Understanding of the Fourteenth Amendment* 34 (1981) (quoting Philadelphia North American and United States Gazette, June 30, 1868, at 2, col. 1).

Opponents of the amendment, meanwhile, saw this as reason to oppose it. Perhaps prescient of cases like the present one, they objected to the extension of federal court jurisdiction into cases of discrimination "between native white citizens . . . and immigrants from other states." James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 Wake Forest L. Rev. 89, 98 (1984) (quoting *Wadesboro Argus*, Oct. 11, 1866, at 1, col. 2).

* * *

In short, the Report of the Joint Committee on Reconstruction, debates on Reconstruction-era civil rights legislation, debates on the Fourteenth Amendment itself, and public discussion of the amendment during ratification all confirm that the *Slaughter-House* majority, *Slaughter-House* dissent, and *Saenz* majority were on sound historical footing in recognizing that the Privileges or Immunities Clause protects a right to migrate and be treated equally in one's new state, including—indeed, especially—in pursuit of a livelihood.

So, too, was Justice Thomas in his *Saenz* dissent and *McDonald* concurrence. The historical record can indeed "be read to support the view that the Privileges or Immunities Clause protects some" of "the fundamental rights of 'citizens' described in *Corfield*," *McDonald*, 561 U.S. at 834 (Thomas, J., concurring in part and concurring in judgment), and one of them is "[t]he right of a citizen of one state . . . to reside in any other state, for purposes of trade, agriculture, [or] professional

pursuits," *Saenz*, 526 U.S. at 525 (Thomas, J., dissenting) (quoting *Corfield*, 6 F. Cas. at 552). "[T]he privileges and immunities of American citizenship," in other words, may well "overlap to at least some extent with the privileges and immunities traditionally recognized in citizens in the several States." *McDonald*, 561 U.S. at 853 (Thomas, J., concurring in part and concurring in judgment). That overlap encompasses the right at issue here. "Article IV ha[d] long been understood to prohibit a state from discriminating against visitors from sister states," particularly in their pursuit of a livelihood, and "[w]hat Article IV did for visitors, the Fourteenth Amendment did for new residents." Amar, *supra*, at 14.

Indeed, one of the most important purposes of the Privileges or Immunities Clause was to allow the newly-freed slaves (and their Northern supporters) to migrate to new states and work when they arrived. Southern states had routinely tried to "exclude[ ]" the freedmen and Northerners "from many occupations of gain" by making it virtually impossible—if not illegal—for them to move or work if they did move. *Slaughter-House*, 83 U.S. (16 Wall.) at 70. The Fourteenth Amendment's framers and ratifying public sought to end such abuse with the Privileges or Immunities Clause, yet Tennessee continues to engage in it, using two- and ten-year durational residency requirements to bar any newly-arrived resident from the

occupation of owning and operating a retail liquor store. This Court should not allow it.[12]

D. Invalidating The Durational Residency Requirements Would Promote, Not Hinder, Federalism

The Association contends that invalidating Tennessee's durational residency requirements would deny states the ability to operate as laboratories of experimentation and contravene the "federalist values inherent in the Twenty-first Amendment." Pet'r's Br. 31, 47. It would do nothing of the sort. States would still be free to ban alcohol or allow it. They would still be free to allow the sale of certain types of alcohol but not others. They would still be free to adopt a three-tier system or a state-run monopoly. What states would not be able to do is implement protectionist schemes that discriminate against newly-arrived residents in favor of long-term residents.

And that is as it should be. No state can "force[] non-residents settling in the State to accept a status inferior to that of oldtimers." *Zobel v. Williams*, 457 U.S. 55, 74 (1982) (O'Connor, J., concurring in judgment). This principle is all-the-more imperative when it comes to the newly-arrived resident's ability to *work*. "Typically, Americans migrate with the intention of taking employment in their destination states, and

---

[12] There is no Twenty-first Amendment "immunity" from challenge under the Fourteenth Amendment. *See Granholm*, 544 U.S. at 486-87.

today a central object of the right to travel is freedom of access to work in an employment market that is national in scope." Karst, *supra*, at 549. States cannot hoard or reserve economic opportunity for longtime residents only.

The right of the newly-arrived resident to equal treatment, moreover, fits squarely within our federalist design. "Part of what connects state sovereignty to the larger picture of our constitutional scheme is that the states represent centers of democratic choice; they are the loci of our republicanism." Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 156 (1999). But "[s]tates are able to serve as centers of democratic choice [only] because . . . people choose their states of residence": they "vote with their feet . . . in deciding which state to call home" and "where to seek employment." *Id.* In this light, protecting a citizen's right to migrate to, and be treated equally in, a new state "allows for *more* innovation and experimentation in government"—not less. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (emphasis added).

Thus, while invalidating Tennessee's durational residency requirements may restrict, in one very narrow way, a state's discretion with respect to retail liquor licensing, it will also promote the very values of federalism that justify affording states discretion to regulate alcohol in the first place.

CONCLUSION

For the foregoing reasons, this Court should affirm the Sixth Circuit's judgment.

Respectfully submitted,

ANYA BIDWELL
INSTITUTE FOR JUSTICE
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

DANA BERLINER
JEFFREY H. REDFERN
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
dberliner@ij.org
jredfern@ij.org

MICHAEL E. BINDAS
Counsel of Record
INSTITUTE FOR JUSTICE
600 University Street
Suite 1730
Seattle, WA 98101
(206) 957-1300
mbindas@ij.org

Counsel for Respondent Affluere Investments, Inc.

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT TENNESSEE FINE WINES AND SPIRITS, LLC, DBA TOTAL WINE SPIRITS BEER & MORE

WILLIAM J. MURPHY
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, MD 21202
(410) 332-0444

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
DEREK A. WEBB
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More

* Counsel of Record

December 13, 2018

QUESTION PRESENTED

Whether the court of appeals correctly held that Tennessee's durational residency requirements for licenses to operate retail liquor stores are unconstitutional, when the State's Attorney General has previously admitted that the requirements are trade barriers that facially discriminate against interstate commerce and the State did not attempt to show that they serve a legitimate state interest.

PARTIES TO THE PROCEEDING

Petitioner is Tennessee Wine and Spirits Retailers Association. Respondents are Zackary W. Blair, in his official capacity as Interim Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More; and Affluere Investments, Inc., dba Kimbrough Fine Wine & Spirits.

RULE 29.6 STATEMENT

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More has no parent corporation, and no publicly held company owns any shares in Respondent.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Statutory Background	3
B. Proceedings Below	10
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. THE COURT OF APPEALS CORRECTLY HELD THAT TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS VIOLATE THE DORMANT COMMERCE CLAUSE	18
A. Tennessee's Durational Residency Requirements Facially Discriminate Against Interstate Commerce	19
B. The State Utterly Failed To Show That Its Durational Residency Requirements Serve Any Legitimate Purpose That Could Not Just As Readily Be Served By Nondiscriminatory Alternatives	22
II. THE COURT OF APPEALS CORRECTLY HELD THAT THE TWENTY-FIRST AMENDMENT DOES NOT SAVE TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS	27

TABLE OF CONTENTS—continued

Page

A. The Twenty-first Amendment Does Not Save Tennessee's Residency Requirements That Discriminate Against Out-Of-State Business Interests 28

B. TWSRA's Attempt To Avoid The Clear Import Of *Granholm* And Its Predecessors Is Unavailing 36

III. THE COURT SHOULD NOT CONSIDER TENNESSEE'S TWO-YEAR RESIDENCY REQUIREMENT IN ISOLATION, BUT IF IT CONCLUDES THAT A TWO-YEAR REQUIREMENT MIGHT BE CONSTITUTIONAL, IT STILL SHOULD AFFIRM BECAUSE THAT REQUIREMENT IS NOT SEVERABLE FROM THE REMAINING PROVISIONS ENJOINED BY THE COURTS BELOW 51

IV. IF THE COURT OF APPEALS' DECISION IS REVERSED, THIS COURT SHOULD REMAND TO PERMIT THE LOWER COURTS TO CONSIDER TOTAL WINE'S PRIVILEGES AND IMMUNITIES CLAUSE CHALLENGE 56

CONCLUSION 57

TABLE OF AUTHORITIES

CASES Page

324 Liquor Corp. v. *Duffy*, 479 U.S. 335 (1987) 45
Arnold's Wines, Inc. v. *Boyle*, 571 F.3d 185 (2d Cir. 2009) 3
Ayotte v. *Planned Parenthood of N. New England*, 546 U.S. 320 (2006) 54, 55
Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984) ..... *passim*
Bainbridge v. *Turner*, 311 F.3d 1104 (11th Cir. 2002) 44
Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) 19, 20
Brown-Forman Distillers Corp. v. *N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) ..... *passim*
C & A Carbone, Inc. v. *Town of Clarkstown*, 511 U.S. 383 (1994) 20, 21, 33
California v. *Rooney*, 483 U.S. 307 (1987) 52
Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564 (1997) 34
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 27, 43
City of Phila. v. *New Jersey*, 437 U.S. 617 (1978) 30
Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 20
Edgar v. *Mite Corp.*, 457 U.S. 624 (1982) 20, 30
Glazer's Wholesale Drug Co. v. *Kansas*, 145 F. Supp. 2d 1234 (D. Kan. 2001) 27
Granholm v. *Heald*, 544 U.S. 460 (2005) ..... *passim*
Healy v. *Beer Inst.*, 491 U.S. 324 (1989) ... *passim*
Hunt v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977) 20

TABLE OF AUTHORITIES—continued

Page

Jelovsek v. *Bredesen*, 545 F.3d 431 (6th Cir. 2008) 7

Lebamoff Enters., Inc., v. *Rauner*, No. 17-2495, 2018 WL 6191351 (7th Cir. Nov. 28, 2018) 56

Lewis v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) 20, 21, 33

Manuel v. *City of Joliet*, 137 S. Ct. 911 (2017) 57

New Energy Co. of Ind. v. *Limbach*, 486 U.S. 269 (1988) 20, 21

North Dakota v. *United States*, 495 U.S. 423 (1990) 44

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 34

Scott v. *Donald*, 165 U.S. 58 (1897) 39, 40

Shafer v. *Farmers Grain Co.*, 268 U.S. 189 (1925) 30

State v. *Tester*, 879 S.W. 2d 823 (Tenn. 1994) 54

Supreme Court of N.H. v. *Piper*, 470 U.S. 274 (1985) 56

In re Swanson, 2 S.W. 3d 180 (Tenn. 1999) 54

Vance v. *W.A. Vandercook Co.*, 170 U.S. 438 (1898) 40, 41

Virginia v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) 55

Virginia v. *Hicks*, 539 U.S. 113 (2003) 53

Walling v. *Michigan*, 116 U.S. 446 (1886) 39

CONSTITUTION AND STATUTES

U.S. Const. amend XXI, § 2 28

U.S. Const. art. IV, § 2, cl. 1 56

TABLE OF AUTHORITIES—continued

	Page
Tenn. Code Ann. § 1-3-110	54
§ 57-3-104	4
§ 57-3-204	3, 4, 5, 6, 8
§ 57-3-208	4
§ 57-3-213	6
§ 57-3-221	26
§ 57-3-222	4
§ 57-3-406	4
§ 57-3-409	4
§ 57-3-818	26
§§ 57-4-201 to -205	7

RULE

Sup. Ct. R. 12.6	15

OTHER AUTHORITY

Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* (1933)	24

INTRODUCTION

This case involves a dormant Commerce Clause challenge to Tennessee's durational residency requirements for licenses to operate in-state retail liquor stores (stores offering alcoholic beverages for "off-premises" consumption, also known as "package stores"). These restrictions are by far the most onerous in the nation. Tennessee effectively imposes a nine-year residency requirement on license applicants and, for corporations, a requirement that 100% of their officers, directors, and stockholders satisfy the nine-year rule. The only conceivable purpose of these requirements is to exclude nonresident owners from Tennessee's market for off-premises sales of alcohol and thereby protect in-state retailers from competition. The State said so itself in two opinions authored by its Attorney General, which disclaimed any other purpose for the requirements. The requirements are so manifestly protectionist that Tennessee is not willing to enforce them (it has not done so for six years). The State also is not willing to defend them. It declined to submit either a response to the petition for *certiorari* or a brief on the merits.

The requirements are also so extreme that the sole party actively defending them, Tennessee Wine and Spirits Retailers Association ("TWSRA")—an association of in-state retailers, who are the primary beneficiaries of the provisions—is only willing to defend one aspect of the scheme: the two-year residency requirement for initial licenses. This selective defense of Tennessee's residency scheme makes two points abundantly clear. *First*, there is no rationale for the State's regime other than protectionism. *Second*, and relatedly, TWSRA does not actually believe the Twenty-first Amendment

argument that it is making. If, as it contends, durational residency requirements fall within Tennessee's "core" powers under the Twenty-first Amendment, and States have authority to enact regulations within their core powers free of judicial scrutiny, then Tennessee had authority to enact the ten-year renewal requirement and the parallel residency requirements applicable to the owners, directors and officers of business entities. TWSRA's unwillingness to acknowledge this or the full consequences of its interpretation of the Twenty-first Amendment fundamentally undermines the soundness of its theory.

While Total Wine is vigorously challenging Tennessee's discriminatory residency requirements, it is not in any way challenging Tennessee's three-tier system, the in-state presence requirement inherent in that system, or the State's operational requirements for retail liquor stores. Total Wine and its affiliates own in-state retail stores that are licensed by and operate successfully *within* three-tier systems in the 23 States where they currently do business. Total Wine's interest here is to continue operating its store in Knoxville, which is threatened by Tennessee's bizarre license renewal requirement, and to prevent other States from adopting similarly protectionist barriers to entry. The constitutional infirmity of Tennessee's residency requirements is that they discriminate against nonresidents like the owners of Total Wine who wish to operate retail stores in Tennessee that comply in all respects with Tennessee's three-tier system. Nor is Total Wine seeking any revision to the principles that this Court has established and that were reaffirmed in *Granholm* v. *Heald*, 544 U.S. 460 (2005). Total Wine submits that under a straightforward application of

those principles, Tennessee's durational residency requirements are unconstitutional.

STATEMENT OF THE CASE

A. Statutory Background

Tennessee, like numerous other States, has a "three-tier system" for the distribution of alcoholic beverages. The State, through the Tennessee Alcoholic Beverage Commission ("TABC"), issues separate classes of licenses to (1) manufacturers and distillers, (2) wholesalers, and (3) retailers. Pet. App. 2a (citing Tenn. Code Ann. § 57-3-201). Manufacturers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers, or in some cases other wholesalers; and only licensed retailers can sell to consumers. *Id.* (citing Tenn. Code Ann. § 57-3-404(b)—(d)). This Court has stated that the three-tier system, which dates back to the end of Prohibition, is "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990)). By positioning independent wholesalers between producers and retailers, such systems "preclude the existence of a 'tied' system between producers and retailers, a system generally believed to enable organized crime to dominate the industry" and to encourage irresponsible alcohol sales. *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 187 (2d Cir. 2009).

The licenses at issue are licenses to operate brick-and-mortar retail package stores in Tennessee. Indeed, the license must be sought by the applicant for business premises that are specified in the application. Tenn. Code Ann. § 57-3-204(a). Tennessee's durational residency requirements should be considered against the background of the State's comprehensive regulation of package stores.

For example, in order even to qualify for a license, retailers must submit to a criminal background check, meet financial responsibility requirements, and demonstrate that they have appropriate moral character and business experience to operate a retail store in a lawful manner. See, *e.g.*, Tenn. Code Ann. §§ 57-3-104(c)(10), -208. Once licensed, package stores are subject to extensive regulations governing their operations, as well as detailed record-keeping requirements and inspections to ensure that they comply with the regulations. See, *e.g.*, Tenn. Code Ann. §§ 57-3-204, -222, -406, -409. These requirements ensure responsible sales practices and provide the State with the ability to penalize retailers who break the rules, including by suspending or revoking their licenses.[1]

In contrast to the foregoing regulations, which largely mirror those imposed by other States, Tennessee has enacted unique and onerous durational residency requirements for retail liquor store licenses that effectively prevent out-of-state residents from owning such stores.[2] These

---

[1] This case does not involve sales of alcohol to consumers through direct shipping. Total Wine is challenging Tennessee's restrictions on the ownership of brick-and-mortar retail stores located in Tennessee. These in-state stores operate within the State's three-tier system and are fully subject to the State's laws that govern the retail sale of alcoholic beverages. Accordingly, contrary to the suggestion of some *amici*, the Court need not address the very different issues presented by *out-of-state* retailers who wish to sell alcohol directly to Tennessee consumers through interstate shipments.

[2] TWSRA's *amici* overstate the prevalence and effect of retailer residency requirements in other States. *See, e.g.*, States' Br. 24-25. Affiliates of Total Wine are currently operating licensed retail package stores in many of the States that are claimed to have residency requirements, including Arizona,

requirements are contained in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A)-(B), which provide:

> (2) No retail license under this section may be issued or transferred to or held by, to any individual:
>
> (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years;
>
> . . .
>
> (3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to, transferred to, or maintained by any corporation unless such corporation meets the following requirements:
>
> (A) No retail license shall be issued to, transferred to, or maintained by any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;

California, Georgia, Kentucky, Massachusetts, Missouri, North Carolina, South Carolina, Virginia, Washington, and Wisconsin, despite the fact that the owners of those licenses are Maryland residents. Many state "residency" requirements are satisfied if business entities establish "resident status" by incorporating or registering to do business in the State. *See* BIO 21-23.

> (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years[.]

The interplay of these provisions creates an almost insurmountable barrier to residents of other States who seek to open retail liquor stores in Tennessee. Individuals must establish residency in Tennessee and continue to maintain it for *at least nine years*. This is so because an individual must be a resident of Tennessee for two years in order to obtain an initial license, but that license—which is only valid for one year, Tenn. Code Ann. § 57-3-213—cannot be renewed unless the individual has been a Tennessee resident for ten years. No individual would make the significant investment necessary to obtain a license, open and stock a store, and build a business without the prospect of license renewal. Accordingly, this scheme effectively imposes a nine-year durational residency requirement on individuals seeking to own and operate Tennessee retail liquor stores.

By operation of Tenn. Code Ann. § 57-3-204(b)(3)(A)-(B), which incorporates the same discontinuity between initial applications and renewals, no business entity would seek a Tennessee retail store license unless *every* officer, *every* director, and *every* stockholder had established Tennessee residency for nine years prior to the date of application. These requirements render ineligible large specialty stores like Total Wine that are owned by out-of-state residents, and the "any stockholder"

requirement ensures that no publicly-traded corporation could ever obtain a Tennessee retail liquor store license.

A notable incongruity in Tennessee's regulatory scheme—one not addressed or even mentioned by TWSRA and its *amici*—is that Tennessee separately licenses retailers of spirits, wine and beer for on-premises consumption (*e.g.*, bars, hotels, and restaurants), Tenn. Code Ann. §§ 57-4-201 to -205, without imposing any residency requirements. Nonresidents can and do own and operate such businesses that serve alcoholic beverages to Tennessee consumers.

TWSRA and its *amici* also fail to mention that the Tennessee Attorney General has twice opined that the residency requirements for retail store licenses are unconstitutional. In 2008, in *Jelovsek* v. *Bredesen*, 545 F.3d 431, 438-39 (6th Cir. 2008), the Sixth Circuit held that nearly identical residency requirements for Tennessee winery licenses violate the dormant Commerce Clause. In the wake of that ruling, a member of the Tennessee General Assembly asked the Tennessee Attorney General whether the individual and corporate residency requirements for retail store licenses in § 204 also violate the dormant Commerce Clause. Relying on *Jelovsek* and this Court's decision in *Granholm*, the Attorney General concluded in Tennessee Attorney General Opinion No. 12-59 (2012), that the residency requirements for retail store licenses are "constitutionally infirm." BIO App. 5a. The Attorney General bluntly concluded that the residency requirements "constitute trade restraints and barriers that impermissibly discriminate against interstate commerce." *Id.* at 11a. He further acknowledged that the scant legislative history "reveals no

legitimate public policy to support these residency requirements and indeed provides some evidence that the legislative intent for the residency requirement for retailers was to deter the sale of alcoholic beverages from outside Tennessee." *Id.*[3] In addition, the Attorney General candidly noted that he could not "conceive of a legitimate local purpose, such as promoting the health and safety of Tennesseans, that could be served solely by enforcement of these residency requirements." *Id.* at 8a. Based on the Attorney General's opinion, the TABC stopped enforcing the residency requirements.

In 2014, the Tennessee General Assembly eliminated the residency requirements for certain classes of retail licensees. It purported to address the constitutional infirmity of the durational residency requirements for package stores by adding (for the first time) a statement of legislative intent to the statute. This statement, which was enacted without any legislative fact-finding, is now codified at § 57-3-204(b)(4):

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in

---

[3] The Attorney General's quotations from the floor debates included the following statements of Tennessee legislators: "This chamber just voted for interstate bank – I mean, to kill interstate banking. I think all this does is kill interstate whiskey" and "Why would we want to have people who are not residents have licenses in the state of Tennessee?" BIO App. 9a-10a.

> § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Later that year, another member of the Tennessee General Assembly asked the Attorney General to opine on the constitutionality of the residency requirements for individual applicants in § 204(b)(2)(A), in light of the added *post hoc* statement of legislative intent.

The Attorney General again opined in Tennessee Attorney General Opinion No. 14-83 (2014), that the residency requirements "facially discriminate against nonresidents" and that "the intent expressed in Tenn. Code Ann. § 57-3-204(b)(4) does not establish a local purpose sufficient to justify the discriminatory licensing provisions." BIO App. 13a; see also *id.* at 17a n.2 (finding that the residency requirements "effectively prevent retailers from other states from entering the liquor retail market"). The Attorney General found that the two-year residency requirement "*cannot* be related to any kind of regulatory or public-safety concern" because there are no educational requirements for potential applicants during the waiting period and no sales for the State to monitor. *Id.* at 17a (emphasis added). In addition,

the Attorney General relied on this Court's finding in *Granholm* that advances in technology—circa 2005—had made it easy for States to conduct electronic background checks and monitor nonresident owners. *Id.* at 18a. Based on this opinion, the TABC continued not to enforce the residency requirements.

B. Proceedings Below

1. Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More ("Total Wine") was formed as a Tennessee limited liability company in November, 2015 and on July 5, 2016, applied for a license to own and operate a retail package store in Nashville, Tennessee. Pet. App. 58a. Total Wine did not and does not satisfy the residency requirements because its members are residents of Maryland, but in its application Total Wine designated a general manager who planned to relocate and become a resident of Tennessee. And, of course, all of the store's prospective employees would be Tennessee residents.

Affiliates of Total Wine currently operate 193 retail alcohol beverage businesses in 23 States. All of the States in which affiliates of Total Wine do business have implemented some form of the three-tier system, and all of the stores are licensed under those systems. The local licensees are typically organized as corporations or limited liability companies. The principal owners of these licensees reside in only one of those States, Maryland. See footnote 2 *supra*.

Respondent Affluere Investments, Inc., dba Kimbrough Fine Wine & Spirits ("Affluere") is a corporation organized and existing under Tennessee law. Its sole owners, directors and officers are Douglas and Mary Ketchum, a married couple with a disabled adult daughter who became residents of

Tennessee in July 2016 because of her medical needs. See JA58. They sought a retail liquor license in Memphis in order to open a small business that would allow them to support themselves while providing care for her. See JA63-65.

TABC staff recommended that Total Wine's and Affluere's licenses be approved, but TWSRA threatened to sue the TABC if it approved the license applications. Pet. App. 4a. After the TABC twice deferred action on the applications, Clayton Byrd, former Executive Director of the TABC, filed an action in Tennessee state court seeking "a declaratory judgment that that [sic] the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2)(A) is either constitutional or unconstitutional." JA17 (Compl. Prayer for Relief, ¶ 3). Section 204(b)(2)(A) includes both the two-year residency requirement for initial licenses and the ten-year residency requirement for renewals. TWSRA, Total Wine, and Affluere were named as defendants. The Complaint alleged that "the Commission's staff would recommend approval of both nonresidents' license applications but for the conflicting statutory residency requirement" because the TABC "[found] no other grounds for denying the nonresidents' license applications." JA14 (Compl. ¶ 14).

TWSRA removed the action to the district court based on the federal question raised in the State's Complaint, and the court realigned Total Wine and Affluere as plaintiffs alongside Byrd (after concluding that Byrd "does not intend to follow the residency requirement absent a court's determination that it is constitutional"), leaving TWSRA as the sole defendant. JA39-40; Pet. App. 4a & n.1.

Total Wine moved for partial summary judgment, arguing that the individual and corporate residency

requirements in §§ 57-3-204(b)(2)(A) and (3)(A) violate both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV of the federal Constitution. JA46-49. TWSRA opposed the motion as did the State, but neither made any real effort to articulate a legitimate government interest served by the residency requirements, and neither proffered any factual evidence (not even an affidavit) in support of any such interest. Instead, they relied upon the legal defense that the residency requirements are protected by the Twenty-first Amendment.

2. The district court granted Total Wine's summary judgment motion, declaring the residency requirements unconstitutional under the dormant Commerce Clause and enjoining their enforcement. Pet. App. 57a-81a. The district court enjoined enforcement of all of the residency requirements "under Tenn. Code Ann. § 57-3-204," not just the two-year residency requirement. JA106.

The court found that the requirements discriminate against out-of-state residents "on their face" by "creating a barrier to entering the Tennessee retail liquor market." Pet. App. 73a-74a; see also *id.* at 74a ("nonresidents of Tennessee will always be unable to obtain a retail liquor license"). It also found that the discrimination cannot be justified on the ground that it advances a legitimate local purpose, noting that the State did not offer "any concrete evidence to show that the discrimination against out-of-state residents is demonstrably justified." *Id.* at 76a-78a. The court rejected the argument that the stated legislative purposes in § 204(b)(4) "suffice to save the residency requirements" because the State made "no attempt to show that nondiscriminatory means would fail to accomplish Tennessee's purposes." *Id.* at 78a-79a.

The district court rejected the argument of TWSRA and the State, purportedly based on this Court's decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005), that the Twenty-first Amendment rendered the residency requirements completely immune from dormant Commerce Clause scrutiny. Pet. App. 65a-72a. It concluded that the fact that *Granholm* "affirmed the legitimacy of the three-tier system does not imply that a regulation, such as the retailer residency requirements at issue, is immune from Commerce Clause challenge." *Id.* at 71a-72a. Finally, the district court did not reach Total Wine's alternative argument based on the Privileges and Immunities Clause. *Id.* at 80a-81a.

3. TWSRA appealed, but the State did not. The State did not seek a stay of the district court's injunction, which allowed Affluere to obtain its liquor license and acquire an existing liquor store in Memphis in the summer of 2017. Total Wine lost its opportunity to obtain a license in Nashville, when it was unable to satisfy a licensing contingency in its store lease due to the pendency of this litigation. But after the court of appeals issued its decision, Total Wine applied for and received a retail license for a new package store in Knoxville. That 30,000 square-foot store opened on June 27, 2018. All of the store's employees, including its store manager, are Tennessee residents.

The State ultimately filed a brief in the court of appeals supporting the residency requirements, but declined to participate in oral argument.

The court of appeals affirmed "the district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)—(B), and (3)(D) in violation of the dormant Commerce Clause." Pet. App. 2a. The panel majority concluded that "the Twenty-first Amendment does not

immunize Tennessee's durational-residency requirements from scrutiny under the dormant Commerce Clause." *Id.* at 6a. It engaged in an extensive analysis of this Court's decision in *Granholm* and the historical analysis contained therein, and rejected TWSRA and the State's contention that the Twenty-first Amendment "*automatically* protects laws regarding wholesalers and retailers." *Id.* at 23a (emphasis added). It then examined whether Tennessee's interests in the durational residency requirements are "'closely related to the powers reserved by the Twenty-first Amendment,'" *id.* at 24a (quoting *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 275-76 (1984)), and concluded that they are not. It reasoned that "requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system," but "imposing durational-residency requirements is not." *Id.* at 27a.

The panel majority then concluded that Tennessee's residency requirements violate the dormant Commerce Clause. It determined that they are "facially discriminatory" because they "prevent[] out-of-state residents from obtaining retail licenses and protect[] in-state residents who are retailers." Pet. App. 31a. It then noted that the State never "argue[d] that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals," and listed several available alternatives. *Id.* at 31a-33a. The panel then severed Tennessee's unconstitutional residency requirements from the remainder of the retail licensing statute. *Id.* at 33a-38a. It did not address Total Wine's Privileges and Immunities Clause argument.

Judge Sutton concurred in part and dissented in part. Pet. App. 40a-56a. He concluded that "the text

of the Twenty-first Amendment, the original understanding of that provision's relationship to the Commerce Clause," and *Granholm* "all support the[] validity" of the residency requirements. *Id.* at 40a. Notably, however, Judge Sutton agreed that two aspects of the residency requirement "must fall": (1) the 10-year residency requirement for license renewals; and (2) application of the residency requirements to 100% of a retailer's stockholders. *Id.* at 54a. He candidly acknowledged that the renewal requirement is the "epitome of arbitrariness" because the State offered no reason why a two-year resident was deemed "local enough" to obtain a license but a three-year resident not "local enough" to renew it. *Id.* at 54a-55a. And he saw "no way to explain th[e] all-or-nothing-at-all stockholder requirement as doing anything other than promoting economic protectionism." *Id.* at 54a. See TWSRA Br. 16-17 (acknowledging that Judge Sutton found that these provisions reflect "impermissible economic protectionism").

4. TWSRA filed a petition for *certiorari*, but the State did not and is therefore a nominal respondent pursuant to Sup. Ct. R. 12.6. The State could have filed a brief in support of the petition, *id.*, but declined to do so. It waived a response.

SUMMARY OF ARGUMENT

Tennessee's durational residency requirements for licenses to operate retail liquor stores undeniably violate the dormant Commerce Clause, the Twenty-first Amendment does not immunize them, and thus the district court properly enjoined them.

1. No party disputes that Tennessee's durational residency requirements cannot survive scrutiny under the dormant Commerce Clause (apart from any

Twenty-first Amendment defense). These requirements facially discriminate against interstate commerce and prevent out-of-state residents from obtaining retail licenses in order to protect Tennessee retailers from competition. Such exclusion of out-of-state businesses from in-state markets is a classic form of discrimination condemned by the dormant Commerce Clause. Accordingly, Tennessee's restrictions are virtually *per se* invalid and the State offered no defense of them not tied to the Twenty-first Amendment.

2. The constitutional amendment ending Prohibition does not save Tennessee's durational residency requirements. In *Granholm* v. *Heald*, 544 U.S. 460 (2005), this Court conducted a thorough review of the history leading up to the Twenty-first Amendment and its prior decisions interpreting the Amendment, and explained that its modern cases establish that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487. The Court used broad terms to describe that principle, making clear that it is not limited to alcohol "products" or "producers," and extends to out-of-state business interests. The Court's application of that principle in *Granholm* and other cases to prohibit discrimination against businesses in the alcohol trade confirms the common-sense proposition that "products" cannot be separated from the people and businesses that produce and sell them.

The nondiscrimination principle is fatal to Tennessee's residency requirements. This Court has made clear that the Twenty-first Amendment was not intended to "save" laws that have no purpose other than protecting in-state businesses. Tennessee's residency requirements are such a law. The State

expressly acknowledged this in recent Attorney General opinions; the State has never articulated, much less created a record to support, any nonprotectionist state purpose for the residency requirements; and no party disputes that the requirements create an insurmountable barrier to new entry by out-of-state owners. This should be the end of the matter.

TWSRA's arguments to the contrary misread and improperly attempt to narrow *Granholm* and this Court's modern alcohol decisions, are based on a faulty historical analysis, and posit a distinction between "core" and "non-core" state powers that disregards the evolution of Twenty-first Amendment case law. TWSRA's attempts to identify outside-the-record justifications for Tennessee's residency requirements are unconvincing—particularly given that Tennessee does not impose *any* residency requirements on owners of bars and other establishments that serve liquor by the drink.

The argument of TWSRA's *amici* that Total Wine is attacking the three-tier system is misguided. Total Wine owns a licensed brick-and-mortar retail store in Tennessee that operates within the State's three-tier system, and its affiliates similarly operate licensed brick-and-mortar retail stores within other States' three-tier systems. Total Wine is not challenging that fundamental system; it is challenging discriminatory residency requirements that exclude nonresidents who wish to operate retail stores in Tennessee and to comply in all respects with the State's three-tier system and other nondiscriminatory regulatory requirements the State imposes on the sale of alcohol.

3. The Court cannot consider Tennessee's two-year residency requirement in isolation. The district

court enjoined all of the residency requirements in the statute. TWSRA is asking this Court to issue an advisory opinion on a hypothetical state statute that imposes less blatantly protectionist provisions than the Tennessee statute as written. The Court should decline this invitation, particularly when the actual controversy for the respondents concerns the ten-year renewal requirement and the requirements governing the residency of all owners, directors and officers of business entities. Moreover, even if the Court were to review in isolation the two-year residency requirement for initial licenses, it would have to affirm the decision below no matter what it decides, because the two-year requirement is not severable from the other residency requirements in the statute.

4. If this Court vacates the court of appeals' ruling on the two-year residency requirement under the dormant Commerce Clause, it still should remand so that the district court can consider Total Wine's independent challenge to Tennessee's durational residency requirements under the Privileges and Immunities Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS VIOLATE THE DORMANT COMMERCE CLAUSE.

TWSRA wisely does not argue that Tennessee's durational residency requirements can survive scrutiny under the dormant Commerce Clause independent of the Twenty-first Amendment. If Tennessee's residency requirements applied to any other type of retail license, they would be constitutionally doomed. See Br. of Wine and Spirits Wholesalers of America, Inc. 8 ("No party disputes

that these provisions would violate the dormant Commerce Clause if the regulated products were books or shoes.").

This concession renders it unnecessary to undertake extensive analysis of the dormant Commerce Clause. Nonetheless, an examination of its core concerns, and the extreme ways in which Tennessee's protectionist residency requirements undermine those concerns, provides important context for evaluating TWSRA's Twenty-first Amendment defense.

A. Tennessee's Durational Residency Requirements Facially Discriminate Against Interstate Commerce.

The fundamental concern of the dormant Commerce Clause is preventing economic protectionism by the States. State laws may not discriminate against interstate commerce, which this Court has defined as "mandat[ing] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472. This prohibition is "essential to the foundations of the Union" because one of the central aims of the Constitution was "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.*; see also *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (a State "may not place itself in a position of economic isolation"). Ultimately, the dormant Commerce Clause seeks to prevent "trade rivalries," "animosities," and "exclusivity." *Granholm*, 544 U.S. at 473.

The different strands of this Court's dormant Commerce Clause jurisprudence reflect the fact that

discrimination against interstate commerce can take many forms. For example, this Court has prohibited States from disadvantaging out-of-state goods or products—including alcohol—through the imposition of discriminatory taxes, costs and regulations. *E.g.*, *Granholm*, 544 U.S. 460 (alcohol); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269 (1988); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984) (alcohol); *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

States also cannot regulate commerce—including commerce in alcohol—that occurs outside of their borders, *i.e.*, state laws cannot have extraterritorial effect. *E.g.*, *Healy* v. *Beer Inst.*, 491 U.S. 324 (1989) (alcohol); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (alcohol); *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982) (plurality opinion); *Baldwin*, 294 U.S. 511. Such laws are often a form of economic protectionism that force "producers or consumers in other States [to] surrender whatever competitive advantages they may possess." *Brown-Forman*, 476 U.S. at 580.

And this Court has held that States cannot exclude out-of-state entities from competing in local markets. *E.g.*, *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) (invalidating Florida law that prohibited out-of-state bank holding companies from owning Florida businesses that provide investment advisory or trust services); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 391-92 (1994) (invalidating municipal ordinance that required all solid waste generated in the town to be processed at a designated local facility because it deprived out-of-state waste processors of "access to local demand for their services"). This Court stated in *Carbone* that the infirm municipal

ordinance was "just one more instance of local processing requirements that we long have held invalid" because they "bar the import of the processing service" for "the benefit of local businesses." *Id.* (citing cases).

The foregoing line of cases confirms that a fundamental and long-standing purpose of the dormant Commerce Clause is to "prohibit[] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Limbach*, 486 U.S. at 273. In *BT Investment Managers*, for example, the Court struck down the Florida statute because it "overtly prevent[ed] [out-of-state] enterprises from competing in local markets." 447 U.S. at 39. The Court explained that the perniciousness of the statute was that it posed an "explicit barrier" to "out-of-state firms with the kinds of resources and business interests that make them likely to attempt *de novo* entry." *Id.*

The court of appeals correctly determined that Tennessee's durational residency requirements are "facially discriminatory." Pet. App. 31a. As the court of appeals explained, the requirements distinguish between in-state and out-of-state residents on their face, and "prevent[] out-of-state residents from obtaining retail licenses" in order to "protect[] in-state residents who are retailers." *Id.* The district court similarly found that the requirements create a "barrier" for nonresidents, who "will always be unable to obtain a retail liquor license." *Id.* at 74a. These requirements are thus quintessential protectionist provisions that "overtly prevent[] [out-of-state] enterprises from competing in local markets." *BT Inv. Managers*, 447 U.S. at 39. And TWSRA does not really contend otherwise. Accordingly, under this

Court's Commerce Clause precedents, Tennessee's discriminatory requirements are subject to "a virtually *per se* rule of invalidity." *Granholm*, 544 U.S. at 476.

B. The State Utterly Failed To Show That Its Durational Residency Requirements Serve Any Legitimate Purpose That Could Not Just As Readily Be Served By Nondiscriminatory Alternatives.

A state law that discriminates against interstate commerce can be upheld only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489. The burden is on the State to justify the discrimination, and it must satisfy an "exacting standard" and make the "clearest showing." *Id.* at 490, 492-93. "[M]ere speculation" and "unsupported assertions" are not enough. *Id.* at 490, 492. Instead, this Court requires "concrete record evidence" that "a State's nondiscriminatory alternatives will prove unworkable." *Id.* at 493.

Because Tennessee made no such showing below (or on appeal), the court of appeals correctly determined that the State did not satisfy its burden. The State's task was admittedly daunting because its Attorney General opined in 2012 that the legislative history pointed to protectionist motives and admitted that he could not "conceive" of a legitimate purpose for the requirements. BIO App. 8a 11a. Even after the legislature added the *post hoc* statement of legislative intent, the Attorney General concluded that this statement did not "establish a local purpose sufficient to justify the discriminatory licensing provisions" and that the two-year residency requirement "*cannot* be related to any kind of

regulatory or public-safety concern" because it does nothing to address such concerns. *Id.* at 13a, 17a (emphasis added). Consistent with the Attorney General's views, the State did not even attempt to make an evidentiary showing in the district court in support of any purported state interests. The State's failure to make a record should be the end of the matter because its burden was to make a "clear[] showing," based on "concrete record evidence."

The courts below focused on the 2014 statement of legislative intent, because that is all they had. They concluded that the vague, high-level state interests asserted in that provision—(1) protecting the "health, safety and welfare" of Tennessee citizens, and (2) ensuring "oversight, control and accountability" for retail store owners and managers, § 204(b)(4)—cannot justify the discrimination. Pet. App. 31a-33a, 76a-80a. The district court "fail[ed] to see how the retailer residency requirements" advance these interests. *Id.* at 80a. It also noted that this Court in *Granholm* "rejected greater regulatory control as a sufficient justification when reasonable nondiscriminatory alternatives could serve that purpose." *Id.* at 79a. The court of appeals concluded that the State has myriad nondiscriminatory alternatives to address these interests, *id.* at 32a-33a, and there are many more in use in Tennessee and other three-tier States, such as requiring out-of-state residents to operate through a business entity organized under state law, requiring the designation of a general manager resident in the State, requiring retailers to post bonds to secure their licenses, conducting regular audits of a retailer's operations to ensure compliance with local laws, or creating an electronic database to monitor the sales practices of all licensed retailers.

TWSRA, its *amici*, and the dissenting panel member, do not identify any shortcomings in the lower courts' analysis. Instead, they simply assert justifications for the discriminatory requirements. Their *post hoc* efforts to identify state interests seem inherently fanciful because Tennessee is not currently enforcing the residency requirements (and has not done so for six years). If these concerns were real, they would have manifested themselves long before now. But in any event the purported justifications are unpersuasive on their own terms. TWSRA, for example, cites the importance of restricting licenses to long-time residents who "know a community" and have incentives to avoid irresponsible alcohol sales in that community. TWSRA Br. 48-50; see also Pet. App. 50a (Sutton dissent). The problem with this justification is that the residency requirements do not serve that purpose because they do not require any licensees to have local community ties or familiarity. A retailer does not have to reside *in the community* in which it owns a store, either before or after it obtains a license; the retailer need only reside somewhere in Tennessee. See Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 7-8 (1933) (States are not "single communities" for purposes of liquor legislation). The notion that someone living in Memphis is more in touch with Knoxville than someone living in Asheville, North Carolina, which is 250 miles closer, is silly.

At the same time, TWSRA ignores that a store's general manager and employees—the persons who actually check IDs and make point-of-sale decisions—will naturally be residents of the surrounding community, regardless of where the store's owners reside. And a retailer's license is always subject to

suspension or nonrenewal if a store's owner or employees permit unlawful sales to minors or commit other violations of local laws or ordinances—no matter where the store's owners reside.

TWSRA also asserts that the residency requirements further the State's purpose of encouraging temperance, citing a truncated version of an exchange during the floor debates on the 1984 statutory amendments. TWSRA Br. 50-51. The State's Attorney General, however, rejected this view of the State's interests and the legislative history. Quoting the full exchange, and its references to restricting liquor sales, the Attorney General concluded that it "reveals *no valid public policy concerns*" to support the requirements. BIO App. 9a-10a (emphasis added). In any event, a restriction on where the owners of Tennessee package stores reside has no effect on how much alcohol Tennesseans purchase and consume.

TWSRA also cites the State's interests in conducting fitness reviews and exercising control and oversight over retailers. TWSRA Br. 48. As the district court noted, Pet. App. 79a-80a, this Court rejected similar arguments in *Granholm* as a justification for discriminatory regulations, 544 U.S. at 492, citing the ease of electronic background checks and financial monitoring—which have only become more sophisticated since 2005. Tellingly, the TABC had no trouble making fitness determinations for respondents here, and stated in the Complaint that they met every license qualification but for the residency requirement. JA14 (Compl. ¶ 14). Residency requirements with respect to store owners are hardly necessary to ensure that licensees employ responsible managers and sales personnel, or designate an agent to receive in-state service of

process. See TWSRA Br. 48. States can and often do impose such simple requirements. See, *e.g.*, Tenn. Code Ann. § 57-3-221 (requiring liquor store managers to obtain a manager's permit and undergo training in alcohol awareness and state regulations); *id.* § 57-3-818 (requiring liquor stores to participate in a responsible vendor training program that certifies all employees).

Finally, all of the purported state interests identified by TWSRA and its supporters ring hollow given that Tennessee does not impose *any* residency requirements on individuals and corporations that own and operate bars, restaurants, and hotels, or grocery stores that are licensed to sell beer and wine. For all of TWSRA's rhetoric about the importance of retailers having community ties and encouraging temperance, Tennessee has not seen fit to impose any residency requirements on modern-day "saloons"—retailers who serve alcohol by the drink to Tennessee consumers.[4] Out-of-state residents are free to open bars "the minute they establish an in-state corporate entity." TWSRA Br. 51. And TABC plainly is able to make fitness determinations for them. Tennessee's selective approach to retailer residency requirements forecloses any argument that Tennessee is genuinely concerned about nonresidents' suitability to own retail alcohol businesses.

---

[4] Amicus U.S. Alcohol Policy Alliance, *et al.*, 16 n.36, notes that in 2017 Tennessee had 2,876 licensed "on-premise" outlets for spirits (bars, restaurants, hotels), but only 552 "off-premise" outlets (retail package stores). The lack of residency requirements for the much larger group of retailers in Tennessee who serve alcohol by the drink wholly undermines the notion that the residency requirements are necessary to serve legitimate policy interests.

As one court concluded in invalidating a Kansas residency requirement for alcohol wholesaler licenses, which Kansas attempted to justify on the ground that it facilitated background checks, "[t]he fact that the state inconsistently allows corporate liquor-by-the-drink retailers" to be nonresidents "undercuts" the claim that the residency requirement "legitimately promotes a state interest." *Glazer's Wholesale Drug Co.* v. *Kansas*, 145 F. Supp. 2d 1234, 1243 n.13 (D. Kan. 2001); see also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 715 (1984) ("Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption in order to constitute a valid exercise of state power under the Twenty-first Amendment, the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here").

The court of appeals correctly concluded that Tennessee's durational residency requirements constitute rank economic protectionism that cannot survive scrutiny under the dormant Commerce Clause. It is unsurprising that TWSRA concedes the dormant Commerce Clause violation and is seeking refuge in the Twenty-first Amendment.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE TWENTY-FIRST AMENDMENT DOES NOT SAVE TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS.

In the lower courts, TWSRA and the State argued (with more and less fervor, respectively) that the residency requirements are not subject to dormant Commerce Clause scrutiny by virtue of the Twenty-first Amendment. The lower courts rejected this Twenty-first Amendment defense, based on thorough

analyses of this Court's decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005). Their rulings were correct. TWSRA's arguments to the contrary misread and improperly attempt to narrow the straightforward holdings of *Granholm* and this Court's other modern alcohol decisions that discriminatory efforts aimed solely at protecting local economic interests are not protected by the Twenty-first Amendment simply because the State happens to be regulating the sale of alcohol. A faithful application of those holdings dooms Tennessee's statute.

A. The Twenty-first Amendment Does Not Save Tennessee's Residency Requirements That Discriminate Against Out-Of-State Business Interests.

The Twenty-first Amendment not only ended Prohibition, it also granted the States regulatory authority over the distribution and transportation of alcohol within their borders. Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend XXI, § 2. This provision establishes two fundamental principles: (1) it authorizes but does not require States to allow the sale and consumption of alcohol within their borders; and (2) it grants the States authority to regulate the system of alcohol distribution within each State, thus authorizing the three-tier system of alcohol distribution that most States use.

In *Granholm*, this Court addressed a dormant Commerce Clause challenge to Michigan and New York laws that "allow[ed] in-state wineries to sell

wine directly to consumers" in those States, but "prohibit[ed] out-of-state wineries from doing so." 544 U.S. at 466. Michigan and New York, like TWSRA here, defended their facially discriminatory direct-shipping laws on the ground that the Twenty-first Amendment authorized them. This Court rejected the States' Twenty-first Amendment defense.

In addressing the interplay between the dormant Commerce Clause and the Twenty-first Amendment, the Court conducted a thorough review of the history leading up to the Twenty-first Amendment and its prior decisions. *Id.* at 476-86. It acknowledged inconsistencies in its case law, and particularly recognized that certain cases decided in the years following ratification of the Twenty-first Amendment failed "to consider the history underlying the Twenty-first Amendment" and took a broad view of State authority to pass discriminatory laws that this Court later disavowed. *Id.* at 485-86 (criticizing *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U.S. 59 (1936)).

After summarizing the history, this Court distilled its modern Twenty-first Amendment cases as establishing three principles: (1) "state laws that violate other provisions of the Constitution," such as the First Amendment and Equal Protection Clause, "are not saved by the Twenty-first Amendment"; (2) the Twenty-first Amendment "does not abrogate Congress' Commerce Clause powers with regard to liquor"; and (3) "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 486-87. For the third principle, the Court cited *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S.

573 (1986); and *Healy* v. *Beer Inst.*, 491 U.S. 324 (1989). *Granholm*, 544 U.S. at 487.

The nondiscrimination principle controls this case, and is fatal to TWSRA's Twenty-first Amendment defense. Although the facts of *Granholm* involved differential treatment of in-state wine and out-of-state wine—and much of the language in the opinion therefore naturally addresses alcohol products and producers—this Court used broad terms to define "the nondiscrimination principle of the Commerce Clause." The Court's language plainly encompasses discrimination against out-of-state business interests, the central concern of the dormant Commerce Clause. For example, this Court began its discussion of the dormant Commerce Clause by stating that "state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (emphasis added) (quoting *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). In the sentence following its statement that state alcohol laws are limited by the nondiscrimination principle of the Commerce Clause, the Court defined a state law as discriminatory "when its effect is to favor in-state *economic interests* over out-of-state *interests*." *Id.* at 487 (emphasis added) (quoting *Brown-Forman*, 476 U.S. at 579).[5] The Court also relied on its prior statement in *Bacchus* that the Twenty-first Amendment was not intended "to

---

[5] *Brown-Forman*, in turn, drew its definition of discrimination from three of this Court's dormant Commerce Clause decisions: *City of Phila.* v. *New Jersey*, 437 U.S. 617 (1978); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925); and *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640-43 (1982) (plurality opinion). *See Brown-Forman*, 476 U.S. at 579.

empower States to favor local liquor *industries* by erecting barriers to competition." *Id.* (emphasis added) (quoting *Bacchus*, 468 U.S. at 276). And in describing the evils of discriminatory laws, this Court stated that they "deprive *citizens* of their right to have access to the markets of other States on equal terms." *Id.* at 473 (emphasis added).

Tellingly, the analysis in *Granholm* focused as much on the nonresident businesses that produce wine (wineries) as on the wine itself—illustrating the common-sense truth that "products" cannot be separated from the people and businesses that produce and sell them. This Court explained that the constitutional infirmity of Michigan's law allowing only in-state wineries to ship wine directly to Michigan consumers was that it allowed the in-state wineries to avoid the "two extra layers of overhead" in Michigan's three-tier system, creating a "cost differential" for out-of-state wineries, which could "effectively bar small wineries from the Michigan market." *Id.* at 473-74. The Court similarly condemned New York's scheme because it "grant[ed] in-state wineries access to the State's consumers on preferential terms," and indeed, no out-of-state winery had ever "run the State's regulatory gauntlet" to enter the New York direct shipping market. *Id.* at 474.[6]

---

[6] This discussion also makes clear that *Granholm* cannot be conceptualized as a case solely about wine *producers* or *production*. Michigan and New York were allowing in-state wineries to serve as their own retailers in certain circumstances, and the commerce at issue was retail sales to in-state consumers. The Michigan and New York laws at issue therefore impacted both the production and retail tiers of the distribution system, and the wholesale tier as well since the States were allowing in-state wineries to bypass that tier. As *Granholm* illustrates, a given state alcohol regulation can impact

This Court likewise recognized in the pre-*Granholm* cases that the Twenty-first Amendment does not permit States to discriminate against out-of-state business interests. *Bacchus* and *Brown-Forman* describe the dormant Commerce Clause's nondiscrimination principle as prohibiting favoritism of "local liquor industries" and "in-state economic interests," respectively. *Bacchus*, 468 U.S. at 276; *Brown-Forman*, 476 U.S. at 579. In *Bacchus*, this Court recognized that Hawaii's discriminatory tax exemptions in favor of Hawaii-produced liquors not only discriminated against out-of-state alcohol products, but also necessarily discriminated against the businesses that produce those products. The Court emphasized that the constitutional problem with Hawaii's attempt to bolster its domestic liquor industry was that it had chosen a means that "favor[ed] local businesses over out-of-state businesses." 468 U.S. at 272. The Court relied upon dormant Commerce Clause decisions holding that States cannot shore up domestic industries "by means of unequal and oppressive burdens upon the industry and business of other States." *Id.*

Healy also squarely involved discrimination against businesses in the alcohol trade. In *Healy*, this Court struck down a Connecticut price affirmation requirement for brewers and shippers of beer for two reasons: (1) it impermissibly regulated commerce in other States; and (2) it "discriminate[d] against brewers and shippers of beer engaged in interstate commerce" by imposing the affirmation requirement only on brewers and shippers who sold in both Connecticut and a border state. *Healy*, 491 U.S. at 340-41. Justice Scalia concurred in part and

---

commerce and businesses in more than one tier of a three-tier system.

concurred in the judgment. He disagreed with the Court's extraterritoriality rationale, but agreed that the law's invalidity was established by its "facial discrimination" against businesses engaged in interstate commerce. *Id.* at 344. Justice Scalia stated that the law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment," *id.*, and *Granholm* quoted that language with approval, 544 U.S. at 488.

This Court's adherence in *Granholm* to the nondiscrimination principle recognized and applied in its prior cases was unequivocal. The States in *Granholm* had argued that *Bacchus* "should be overruled or limited to its facts," because they recognized that *Bacchus* was "fatal" to their facially discriminatory statutes. *Id.* at 488. The Court expressly rejected this invitation, reiterating that "the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." *Id.* It further noted that "[a] retreat from *Bacchus* would also undermine *Brown-Forman* and *Healy*," *id.*, because, as noted, the nondiscrimination principle that the Court confirmed in *Granholm* was acknowledged and applied in those cases.

The case law under the dormant Commerce Clause further confirms that the "nondiscrimination principle of the Commerce Clause" which limits state alcohol laws, *id.* at 487, is expansive. That principle encompasses discrimination against out-of-state economic actors such as the owners of Total Wine. As shown above, this Court's dormant Commerce Clause decisions have long recognized that protectionism and discrimination against interstate commerce can take many forms, including preventing out-of-state businesses from competing in local markets. *E.g.*, *BT Inv. Managers*, 447 U.S. 27; *Carbone*, 511 U.S. 383.

This line of cases establishes that a key purpose of the dormant Commerce Clause is to prohibit state laws that erect entry barriers to out-of-state economic interests. Many of these cases involve economic actors who provide services rather than produce goods, such as the investment advisory services at issue in *BT Investment Managers* or the waste processing services at issue in *Carbone*. See also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 577 n.10 (1997) (dormant Commerce Clause jurisprudence applies "to service industries").[7]

The nondiscrimination principle established and reaffirmed in these cases is "fatal" to Tennessee's residency requirements, just as it was fatal to the laws at issue in *Granholm*, *Bacchus*, and *Healy*. These cases establish that the Twenty-first Amendment was not intended to "save" laws that have no purpose other than protecting in-state businesses. *Granholm*, 544 U.S. at 488 (a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment") (quoting *Healy*, 491 U.S. at 344 (Scalia, J., concurring in part and concurring in judgment)); *Bacchus*, 468 U.S. at 276 ("State laws that constitute mere economic protectionism are therefore not entitled to the same

---

[7] Although this Court in *Granholm* left no doubt that discriminatory alcohol laws are not "saved" by the Twenty-first Amendment, it did not address whether the Amendment eliminates *Pike* balancing with respect to alcohol laws that are even-handed. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (an even-handed law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits"). This case does not raise any issue of *Pike* balancing, however, because Tennessee's residency requirements facially discriminate against out-of-state residents.

deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor"); *Healy*, 491 U.S. at 340-41 (invalidating discriminatory alcohol law because the Court "perceive[d] no neutral justification for this patent discrimination"); see Pet. App. 49a (Judge Sutton acknowledging that state alcohol laws are unconstitutional if "a challenger can show that they serve no purpose besides 'economic protectionism'") (quoting *Bacchus*, 468 U.S. at 276)).

As shown above, Tennessee's requirements facially discriminate against out-of-state residents who wish to own retail liquor stores in Tennessee and there is no purpose for the State's regime other than protectionism. The State expressly acknowledged this in the recent Attorney General opinions, in the clearest terms. *E.g.*, BIO App. 8a, 11a-12a (concluding that the residency requirements "constitute trade restraints and barriers" and that the Attorney General's office could not "conceive of a legitimate local purpose" for them).

During this litigation, Tennessee has never clearly articulated, much less created a record to support, any legitimate state purpose for the residency requirements. The fact that the State stopped enforcing the requirements six years ago confirms that the TABC does not think that they serve any important regulatory purpose. And the Court cannot ignore the irony that a trade association of in-state retailers—which frankly admits that its standing is based on its interest in avoiding "competitive injury," Cert. Reply Br. 8—brought the case to this Court and is defending the Tennessee laws, wearing the shoes of the State. Given that Total Wine complies with every regulatory requirement that Tennessee imposes on its in-state retailers, the only basis for petitioner to be in this Court is its desire to limit competition.

In sum, Tennessee's requirements create an insurmountable barrier to new entry by nonresident owners. That wall at the Tennessee border violates the principle that States may not "favor local liquor industries by erecting barriers to competition." *Granholm*, 544 U.S. at 487 (quoting *Bacchus*, 468 U.S. at 276). This should be the end of the matter.[8]

B. TWSRA's Attempt To Avoid The Clear Import Of *Granholm* And Its Predecessors Is Unavailing.

No doubt recognizing that the nondiscrimination principle reaffirmed in *Granholm* is fatal to Tennessee's residency requirements, TWSRA repeats the approach of the unsuccessful States in *Granholm*: arguing that the principle should be limited in its application. This Court again should decline the invitation to limit the nondiscrimination principle.

1. TWSRA's principal argument is that *Granholm* and the cases that preceded it stand for the proposition that the Twenty-first Amendment does not empower States to discriminate against out-of-state alcohol "products," but does not restrict the States from discriminating against the people and companies that sell those products. *E.g.*, TWSRA Br. 41-44, 52, 54. In TWSRA's view, States have *carte blanche* to discriminate against nonresidents who wish to own in-state businesses, so long as they "'treat liquor produced out of state the same as its

---

[8] TWSRA argues that courts cannot determine that an alcohol law is protectionist without engaging in an intrusive "reasonableness review." TWSRA Br. 43-44. This Court, however, had no trouble identifying protectionism in *Granholm*, *Bacchus*, and *Healy*, and no "reasonableness" review is necessary here, where Tennessee has not identified a legitimate nonprotectionist purpose for any of the residency requirements.

domestic equivalent.'" *Id.* at 55 (quoting *Granholm*, 544 U.S. at 489). This argument is both legally and logically flawed.

a. The above discussion of *Granholm* and this Court's other modern alcohol cases shows that the nondiscrimination principle that this Court recognized in those cases is not limited to discrimination against out-of-state alcohol products. This Court has certainly never stated such a limitation. To the contrary, the language of this Court's opinions is broader and expressly encompasses discrimination against out-of-state business interests, which remains the fundamental concern of the dormant Commerce Clause. TWSRA acknowledges this broad language in *Granholm* and *Bacchus*, but attempts to dismiss it as the Court merely describing "background principle[s]" of the dormant Commerce Clause. TWSRA Br. 53. This is wishful thinking, however, because the Court held that state alcohol laws are limited by "the nondiscrimination principle *of the Commerce Clause*," *Granholm*, 544 U.S. at 487 (emphasis added). This plainly indicates that "discrimination" should be defined with reference to all of the dormant Commerce Clause principles this Court has articulated. One of those principles is that state laws that exclude out-of-state businesses from entering local markets constitute a form of impermissible discrimination.

Moreover, in *Granholm*, *Bacchus*, and *Healy*, the States' discrimination against interstate businesses was part of this Court's rationale for striking down the state laws at issue. *Granholm*, 544 U.S. at 473-74; *Bacchus*, 468 U.S. at 272; *Healy*, 491 U.S. at 340-41. This Court recognized that the States' discrimination against out-of-state products went

hand-in-hand with their discrimination against the businesses that produced and sought to sell the products in interstate commerce. TWSRA's attempt narrowly to characterize these cases as merely involving discrimination against out-of-state products not only ignores this Court's full analysis, but also attempts to downplay the importance of a type of discrimination (discrimination against out-of-state business interests) that this Court recognizes as of equal constitutional concern in the alcohol context.

b. TWSRA attempts to avoid the clear import of the modern Twenty-first Amendment cases by asserting that historical analysis shows that the Amendment only restricts the States from discriminating against out-of-state alcohol products. This foray into the complex history and case law concerning alcohol regulation ignores that the broad nondiscrimination principle that this Court reaffirmed in *Granholm* was based on a thorough analysis of that history. More importantly, however, that history is fully consistent with this Court's recognition just 13 years ago in *Granholm* that state laws cannot discriminate against either out-of-state alcohol products or out-of-state economic actors.

TWSRA acknowledges that state laws that discriminate against out-of-state alcohol products are not authorized by the Twenty-first Amendment. TWSRA explains that States "had no power to pass laws that discriminated against out-of-state products before Prohibition," and that because the Twenty-first Amendment "simply restored state authority over alcohol regulation" to what it was before Prohibition, States are "left without authority to discriminate against out-of-state liquor." TWSRA Br. 41-42. TWSRA's resort to pre-Prohibition history tracks this Court's recognition in *Granholm* that the

Twenty-first Amendment did not give States authority to discriminate against "out-of-state goods" because that was "a privilege they had not enjoyed at any earlier time." *Granholm*, 544 U.S. at 484-85; *id.* at 483 ("The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state.").

Under this analysis, however, state laws that discriminate against nonresident owners of alcohol businesses are not authorized by the Twenty-first Amendment for the same reason: the States did not have power to enact such laws before Prohibition. *Walling* v. *Michigan*, 116 U.S. 446 (1886), and *Scott* v. *Donald*, 165 U.S. 58 (1897), illustrate this principle. TWSRA characterizes *Walling* as invalidating a Michigan "tax imposed only on out-of-state liquor," TWSRA Br. 26, but the tax at issue was not imposed on alcohol *products* at all. It was levied on persons who, on behalf of nonresident businesses, engaged in the sale of liquor to be shipped into Michigan. *Walling*, 116 U.S. at 459; see *Scott*, 165 U.S. at 94. The Commerce Clause challenge was brought by a salesman for an Illinois liquor wholesale business, who was criminally prosecuted for not paying the tax. *Walling*, 116 U.S. at 450. This Court invalidated Michigan's tax because it "discriminate[d] against the *citizens and products* of other States." *Id.* at 460 (emphasis added); see also *id.* at 461 (noting that the tax "operate[d] as a discriminative burden against the introduction and sale of the products of another State, *or against the citizens of another State*") (emphasis added). Thus, the constitutional infirmity of the tax in *Walling* was as much its discrimination against the out-of-state wholesaler

and its representative, as its discrimination against imported alcohol products.

In *Scott*, this Court invalidated a South Carolina law that required all liquor sales to be channeled through a state liquor commissioner, on the ground that the law included provisions that "discriminated against out-of-state manufacturers." *Granholm*, 544 U.S. at 479. The Court relied on *Walling* and its reasoning. *Scott*, 165 U.S. at 94. It also stated that alcohol is entitled to "the same measure of protection, under the constitution and laws of the United States, as is given to other articles." *Id.* at 91. The Court therefore relied upon Commerce Clause cases involving nonalcohol products that had voided state statutes on the ground that they "discriminat[ed] against the products *and business* of other states." *Id.* at 97 (emphasis added).

Like this Court's more recent cases, *Walling* and *Scott* demonstrate that discrimination against alcohol *products* and discrimination against the *people who own businesses* that sell them cannot be separated for analytical purposes. They further demonstrate that TWSRA's assertion that only laws discriminating against out-of-state products are subject to the dormant Commerce Clause is historical revisionism. Because the Twenty-first Amendment did not grant the States powers to discriminate against interstate commerce that "they had not enjoyed at any earlier time," *Granholm*, 544 U.S. at 484-85, it left States without power to discriminate against either out-of-state products or out-of-state business owners, because they did not have either power in the pre-Prohibition era.[9]

---

[9] TWSRA repeatedly suggests that this Court upheld a residency requirement for liquor licenses in *Vance* v. *W.A.*

2. Some of TWSRA's *amici* attempt to limit *Granholm* in another way, arguing that it only prohibits discrimination against out-of-state *producers*, but not *wholesalers* or *retailers*. See, *e.g.*, Br. of American Beverage Licensees 13-18. TWSRA wisely does not make this argument. Again, this Court did not state such a limitation in *Granholm*. And as shown, although the Court naturally referred to alcohol "products" and "producers" throughout the *Granholm* opinion because the case involved wine and wineries, the language of the opinion broadly encompasses out-of-state business interests—without any limitation to out-of-state producers. See also *Granholm*, 544 U.S. at 472 ("States may not enact laws that burden out-of-state producers *or shippers* simply to give a competitive advantage to in-state businesses.") (emphasis added). This argument also ignores that *Granholm* itself was fundamentally

---

Vandercook Co., 170 U.S. 438 (1898), but no such requirement was at issue in that case. *See* TWSRA Br. 18, 27, 35. *Vance* involved a constitutional challenge to South Carolina's law that gave state officers exclusive authority to buy liquor for resale in the State, subject to an exception for shipments of liquor from out-of-state sellers to South Carolina residents for personal use. 170 U.S. at 443. One of the arguments against that law was that it discriminated against interstate commerce by providing the state agents with the "opportunity" to "buy in one State to the detriment and exclusion of the products of every other State." *Id.* at 450. In rejecting that argument, the Court analogized to a *hypothetical* state law in which the in-state agents were private individuals ("residents"). *Id.* at 451. The Court used the hypothetical to explain that neither South Carolina's actual system nor the hypothetical one would exclude out-of-state liquor because South Carolina consumers still could purchase such products for personal use. *Id.* at 451-52. In posing the hypothetical, the Court did not actually consider or address the States' authority to impose residency requirements, much less durational residency requirements like those at issue here.

about *retail sales*, and whether wineries could serve as their own *retailers* and *wholesalers*. Accordingly, any suggestion that *Granholm* was merely about "producers" ignores the realities of that case. Moreover, that limitation would distort the legal inquiry by encouraging disputes over artificial attempts to categorize regulations as affecting only one tier or another, which is wholly unnecessary to protect the three-tier system.

This proposed limitation of dormant Commerce Clause protections to producers also is inconsistent with this Court's prior decisions. In *Bacchus*, for example, Hawaii's discriminatory excise tax was imposed on *wholesale* liquor sales, and the appellants who brought the constitutional challenge were *wholesalers*. *Bacchus*, 468 U.S. at 265-66. This Court specifically held that the wholesalers had standing to challenge the tax, *id.* at 267, clearly recognizing that the discriminatory effects of Hawaii's scheme extended beyond "products" and "producers." Similarly, in *Healy*, this Court condemned Connecticut's price affirmation scheme because it discriminated against both brewers *and shippers* of beer engaged in interstate commerce. *Healy*, 491 U.S. at 340-41; *id.* at 329 (noting that the plaintiffs included "major producers *and importers* of beer") (emphasis added). Thus, nothing in *Granholm* and this Court's prior decisions supports the notion that, with respect to the alcoholic beverages industry alone, the nondiscrimination principle is limited to producers.

3. TWSRA also attempts to re-classify this Court's precedents based on whether the laws at issue were within a State's "core powers" under the Twenty-first Amendment. TWSRA Br. 37-44. According to TWSRA, a law is "core" if it directly

regulates the sale or use of liquor within a State's borders. TWSRA Br. 6 (citing *Capital Cities*, 467 U.S. at 713). And, according to TWSRA's analysis, if a state law is core, the State's authority is "unfettered by the dormant Commerce Clause." *Id.*

This argument also disregards the evolution of Twenty-first Amendment case law. The *Capital Cities* opinion alluded to the older, "core power" rubric—in a case rejecting a Twenty-first Amendment defense of a state law that prohibited in-state alcoholic beverage advertising, including from cable signals originating out-of-state. (The Commerce Clause was not at issue in *Capital Cities*; the question was whether federal cable broadcasting regulations pre-empted the Oklahoma advertising ban.) Notwithstanding its reference to a State's core powers, the *Capital Cities* decision balanced the competing state and federal interests in a matter involving how liquor could be marketed within the State in order to determine whether the state law could be salvaged by the Twenty-first Amendment. 467 U.S. at 712-16.

Eleven days after *Capital Cities*, the Court struck down Hawaii's wholesale liquor tax that exempted two locally manufactured alcoholic beverages—a law that was clearly within TWSRA's broad conception of Hawaii's "core powers" to regulate the sale of beverages within the State. *Bacchus*, 468 U.S. 263. In *Bacchus* (as in *Granholm*), the Court recognized that despite broad language in some of its early opinions, it had "more recently" recognized "the obscurity of the legislative history of § 2" of the Twenty-first Amendment. *Id.* at 274. In fact, "[n]o clear consensus concerning the meaning of the provision is apparent." *Id.* Consequently, the Court held that alcohol regulations that discriminate

against out-of-state interests must be subjected to a "pragmatic effort to harmonize state and federal powers." *Id.* at 275 (quoting *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980)). And the Court concluded that state laws are not immune from Commerce Clause scrutiny merely because they regulate the sale or use of liquor inside the State. On the contrary, state laws that constitute "mere economic protectionism" are not entitled to the same deference as those "enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276.

Thus, a state liquor law that discriminates against out-of-state interests is judged not simply by whether it regulates in-state distribution (the "core power" rubric), but also by whether it promotes a core purpose of the Twenty-first Amendment, and whether the promotion of that purpose outweighs the Commerce Clause interests at stake. *Id.* at 275-76. The core purposes of § 2 are typically identified as the promotion of temperance, see *id.*, and the preservation of "orderly market conditions," see *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion), which is often said to include the facilitation of taxation. *E.g.*, *Bainbridge* v. *Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002). The precise boundaries of core § 2 purposes are inherently fuzzy, but "erecting barriers to competition" in order to favor local liquor industries is decidedly outside of them. *Bacchus*, 468 U.S. at 276. After *Bacchus* (and at times before), this Court has regularly invalidated state laws that facially regulate in-state distribution but clearly promote economic protectionism. See *Brown-Forman*, 476 U.S. 573 (laws that facially regulate in-state sales but effectively regulate commerce in other States are not insulated from

Commerce Clause scrutiny); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 348 (1987) (purely in-state pricing regulations were invalidated by federal law even if State intended the regulations to protect small retailers); *Healy*, 491 U.S. 324 (invalidating Connecticut law that required beer distributors to affirm that prices to Connecticut wholesalers were no higher than prices in bordering States); *Granholm*, 544 U.S. at 493 (States' power to ban direct shipping by out-of-state wineries is not unfettered when state law permits direct shipping by in-state wineries).

TWSRA's effort to classify all inconvenient cases as "non-core" is unpersuasive. See TWSRA Br. 40-41. To claim that these cases were "unrelated to the structure of the alcohol distribution system," *id.* at 41, is fantasy; the laws at issue in *Midcal*, *324 Liquor*, *Bacchus*, *Brown-Forman*, *Healy*, and *Granholm* all related to in-state pricing, taxation, or shipping of alcoholic beverage products as they moved through the relevant State's three-tier system. Indeed, TWSRA recognizes that *Bacchus* does not fit its taxonomy, so it claims that discrimination against out-of-state products is non-core while, presumably, any other type of discrimination against out-of-state economic interests or market participants is core. TWSRA Br. 43. That makes no sense. As noted, the argument ignores that the Tennessee law at issue facially discriminates against out-of-state persons who want to sell products, most of them originating from out-of-state, through in-state retail stores. Because the objects of the State's discrimination are the persons who wish to sell alcoholic beverages rather than the alcoholic beverages themselves, TWSRA contends that the Tennessee law is within the State's purported "core power" to discriminate. Even so, TWSRA's products-only rule is inconsistent

with *Granholm*, which invalidated a law that discriminated against out-of-state suppliers, as much as the products they supplied.

The Court should not adopt TWSRA's awkward attempt to bifurcate the case law. This Court's modern cases set forth a practical analysis that balances how well a discriminatory state law serves a core Twenty-first Amendment purpose against the Commerce Clause interests at stake. When the law is fundamentally and undeniably aimed at protecting in-state economic interests by creating barriers to entry, as the Tennessee law here unquestionably is, the Twenty-first Amendment provides no exemption from the dormant Commerce Clause's "core purpose" of prohibiting such economic "Balkanization." Instead, "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Granholm*, 544 U.S. at 476 (quoting *City of Phila.* v. *New Jersey*, 437 U.S. 617, 624 (1978)).

4. A number of *amici* supporting TWSRA falsely depict this case as an attack on the three-tier system prevalent in most States. TWSRA itself is more circumspect; it sees the three-tier system as a justification for certain types of interstate discrimination, but does not quite say that the decision below will dismantle the three-tier system. The "attack" argument is presented most hyperbolically in the States' *amici* brief, which makes no discernible effort to understand what this case is about and consequently presents page after page of argument that is fully consistent with Total Wine's position, and indeed with its business model. *E.g.*, States' Br. 28-29 (worrying that "a State cannot inspect the premises of retailers that operate out of state").

Total Wine is a brick-and-mortar retailer operating in Knoxville, Tennessee, and sells alcoholic beverages to Tennessee residents only from that store. Its owners also operate retail stores in many other States but Total Wine does not use them, or want to use them, to sell products to Tennesseans. Total Wine's Knoxville store is owned by a Tennessee LLC (organized under the laws of Tennessee, but whose owners are nonresidents). Total Wine possesses, and wants to retain, a Tennessee license to sell alcoholic beverages. Total Wine purchases the product it sells at retail in Tennessee exclusively from Tennessee-licensed wholesalers. Total Wine's managers and employees are Tennessee residents and generally live in or around Knoxville, where the store is located. Total Wine adheres to the extensive Tennessee laws and regulations that govern the retail sale of alcoholic beverages in Tennessee; indeed, Total Wine's vast experience gives it many advantages in fulfilling state and community imperatives such as combating underage liquor sales; tracking inventory; paying taxes; and so forth. The decision below changes none of this, except the requirement that the LLC members be Tennessee residents for nine years. That modest change is not even a superficial wound to the three-tier system, much less the mortal blow that many *amici* conjure.

The rationales for a durational residency requirement advanced by TWSRA and its *amici*—whether for two years or ten—are flimsy, unsupported by empirical or even anecdotal evidence. The most common rationale is that residency requirements ensure licensee investment in the welfare of the community, whose members bear the benefits and burdens of liquor sales. Yet no one who advances this rationale can explain why Total Wine,

with dozens of community employees and millions of dollars in community investment, will not understand or care about the local community in which it does business. Nor can anyone explain how the Tennessee residency requirement, which applies to state residency, has any effect on community investment. For example, a resident on the south side of State Street in Bristol, Tennessee, can own a store 500 miles away in Memphis, while a resident of the north side (in Bristol, Virginia) cannot even own a store on the south side.

Predictably, the *amici* briefs invoke the historic evils of prostitution, gambling, organized crime and, more dubiously, "tied houses." *E.g.*, States' Br. 12-13. All parties, assuredly including Total Wine, stoutly oppose the first three of these vices, and tied-houses no longer exist under the three-tier system, which is why Total Wine supports that system. But none of these historic evils has a rational connection to a durational residency requirement for retail-store licensees. (A residency requirement would not have saved Illinois or any other State from the predations of Al Capone, who flourished during Prohibition, when liquor regulation was at its zenith.) The historic concerns about nonresident ownership arose from the belief that ownership of saloons by national or regional breweries (the tied-house concept) was tainted by a profit motive to sell more product for immediate (or "on-premises") consumption. Tennessee has never alluded to any such concerns in this litigation—and it could not credibly do so, given that it permits nonresident ownership of saloons, bars, and restaurants that sell liquor by the drink.

Numerous *amici* also contend that States cannot adequately regulate nonresident owners. This is nonsense. Tennessee has vast authority to regulate

Total Wine, which invested millions in a 30,000 square-foot brick-and-mortar store and an extensive inventory consisting of more than 10,000 separate products. Total Wine employs Tennessee residents who operate the store, and its license and corporate charter are issued by the State and subject to its plenary control. That the owners of the LLC reside in other States does not mean they are difficult to regulate. Tennessee can (and does) predicate issuance of a license on thorough background checks of the owners and operators of all package stores, even (or perhaps especially) those owned by nonresidents like Total Wine. And the State can impose any number of other conditions such as in-person interviews of owners, appointment of in-state agents for service of process, forfeiture bonds, and so forth, so long as the conditions are nondiscriminatory. In sum, none of the *amici* who argue that durational residency requirements are important to the States' regulatory purposes adequately explain how regulatory control is improved by requiring durational residency for owners—as opposed to, or in addition to, physical presence of the retail stores.

A common feature of all forms of discrimination is the insiders' belief that outsiders are somehow immoral, depraved, uncaring, or ignorant. These beliefs are usually grounded in fear, prejudice, or protectionism, rather than evidence. And certainly TWSRA and its *amici* cite no evidence (and there is none in the record) that a Tennessee company with a Tennessee license that operates a Tennessee liquor store through Tennessee employees will lead to untoward sales of alcohol simply because the company is owned by persons who have not lived in Tennessee for nine years. Given that no other State

has a similarly restrictive requirement, it is hard to take seriously the suggestion that this insuperable barrier to entry is even a rational way to promote Tennessee's regulatory interests.

Commercial discrimination against nonresidents may not have the same moral force as racial discrimination against African-Americans or gender discrimination against women, but it is nonetheless highly suspect as a legislative rationale and fundamentally inconsistent with the Constitutional design. The nondiscrimination principle of the dormant Commerce Clause saves the States from the economic Balkanization that escalates whenever one State discriminates against another's products *or its citizens*. The logical response is retaliation, followed by further protectionist measures, and ultimately a nation of fragmented and insular markets. This Court must police the boundaries and strike down senselessly protectionist laws, like Tennessee's in this case.

In sum, the Tennessee durational residency requirements at issue here are blatantly discriminatory against nonresident business interests, and the State has not met its burden of demonstrating that they are justified by legitimate regulatory interests that outweigh the protections of the dormant Commerce Clause.

III. THE COURT SHOULD NOT CONSIDER TENNESSEE'S TWO-YEAR RESIDENCY REQUIREMENT IN ISOLATION, BUT IF IT CONCLUDES THAT A TWO-YEAR REQUIREMENT MIGHT BE CONSTITUTIONAL, IT STILL SHOULD AFFIRM BECAUSE THAT REQUIREMENT IS NOT SEVERABLE FROM THE REMAINING PROVISIONS ENJOINED BY THE COURTS BELOW.

In its petition and briefing, TWSRA attempts to avoid review of the actual Tennessee statute as written, and in the form in which it was enjoined by the lower courts. The district court enjoined in its entirety a Tennessee statute that required an individual applicant for a retail liquor license to establish two years of Tennessee residency before qualifying for an initial license, and ten years of consecutive Tennessee residency before qualifying to renew that license after it expired a year later. With respect to corporations and other business entities, the Tennessee statute imposed those requirements on *every* officer, director, and stockholder of a prospective licensee. See JA106 (enjoining enforcement of "the residency requirements under Tenn. Code Ann. § 57-3-204," which include the ten-year residency requirement for renewals and the requirements for business entities).

Unwilling to defend several aspects of that scheme, TWSRA seeks to carve out for constitutional approval the two-year residency requirement for initial licenses—and thereby urges this Court to disregard the ten-year renewal requirement and the 100% stockholder requirement for business entities (which even the dissenting judge in the court of appeals

could not abide).[10] The Court should decline this invitation, for multiple reasons.

First and foremost, the two-year residency requirement is as discriminatory and indefensible as the other requirements in the statute. For all of the reasons previously described, that requirement presents an insurmountable barrier to nonresidents who have no desire to relocate to Tennessee, such as the owners of Total Wine, and serves no state interest other than the impermissible one of protecting TWSRA's members from competition.

Second, TWSRA's request is procedurally improper. This Court's function is to review the judgments that come before it, *California* v. *Rooney*, 483 U.S. 307,

---

[10] TWSRA asserts that this case "asks whether Tennessee violated the dormant Commerce Clause by limiting retail liquor licenses to individuals who have resided in Tennessee for the previous two years, and to corporations whose directors and officers satisfy the same requirement." TWSRA Br. 6.

TWSRA asserted at the petition stage that "this case is, and has always been, about" only the two-year residency requirement, Cert. Reply Br. 2, but that is wishful thinking. Although the introduction of the State's Complaint for declaratory judgment addressed only the two-year residency requirement, JA10-11, the body of the Complaint quoted the license renewal provision in § 57-3-204(b)(2)(A), JA12-13 (Compl. ¶ 7), and described both Affluere and Total Wine as business entities that did not meet the residency requirements in § 204(b)(2)(A), JA14 (Compl. ¶¶ 12-13). More importantly, after the district court realigned Total Wine and Affluere as plaintiffs, Total Wine sought summary judgment with respect to the individual and corporate residency requirements in §§ 57-3-204(b)(2)(A) and (3)(A), which include the ten-year renewal provision and the 100% stockholder requirement. JA46-49. The lower courts therefore addressed all of these provisions (as TWSRA concedes, TWSRA Br. 13-14, 16-17), and they all are currently enjoined under the district court's order, which was affirmed *in toto* by the court of appeals.

311 (1987) (per curiam), and not to carve out from those judgments academic questions that do not resolve the case. The judgment here enjoined all of the residency requirements in § 57-3-204, without any differentiation or separate treatment of them. TWSRA is trying to avoid review of the actual judgment and statute at issue by asking this Court to issue an advisory opinion on whether a hypothetical state statute that imposed less blatantly protectionist provisions might pass constitutional muster. The Court should deny this request and review the statute that was enacted, has been enjoined, and that frames the actual controversy between the parties. Because both respondents have now obtained initial licenses, this case turns for them, in substantial part, on the validity of the ten-year renewal requirement. In addition, both respondents are business entities subject to the "any officer, director, or stockholder" provision of § 57-3-204(b)(3); even today Total Wine cannot satisfy that provision.

Third, even if the Court were to review in isolation the two-year residency requirement for initial licenses, it would have to affirm the decision below no matter what it decides. This is because the two-year requirement is not severable from the other residency requirements in § 57-3-204(b).

The question whether the residency requirements in § 57-3-204(b) are severable from each other "is of course a matter of state law." *Virginia* v. *Hicks*, 539 U.S. 113, 121 (2003). The issue of severability was not briefed below, and neither lower court addressed it. The court of appeals found that the residency scheme as a whole could be severed from other provisions of Tennessee's retail license law, which address various "unrelated" topics (*e.g.*, minimum age requirement, application fees), Pet. App. 33a-37a, but

it did not address the distinct and more difficult question whether the individual components of Tennessee's residency scheme can be severed from each other. Normally, this Court would remand such an unaddressed question of state law and could do so here. See, *e.g.*, *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006).

Alternatively, the Court could affirm because it is clear that the two-year residency requirement cannot be severed under Tennessee law. Tennessee's "doctrine of elision" permits severance, but the doctrine "is not favored." *State* v. *Tester*, 879 S.W. 2d 823, 830 (Tenn. 1994). Elision is appropriate only "if it is made to appear *from the face of the statute* that the legislature would have enacted it with the objectionable features omitted," and if this conclusion can be reached "*fairly clear of doubt from the face of the statute.*" *Id.* (emphases added). A severability clause "in the statute" is evidence in favor of elision. *Id.* While the Tennessee Code contains a general severability provision, Tenn. Code Ann. § 1-3-110, that provision is not "automatically" applicable to every situation. *In re Swanson*, 2 S.W. 3d 180, 189 (Tenn. 1999). To the contrary, elision is appropriate only "when a conclusion can be reached that the legislature would have enacted the act in question with the unconstitutional portion omitted." *Id.*

Tennessee's retail licensing law itself does not contain a severability clause, and there is no evidence on the face of the residency requirements or the licensing provisions as a whole to indicate that the legislature would have enacted the residency requirements without the provisions that TWSRA is unwilling to defend. As shown above, it is the interplay between the residency requirements for an initial license and the ten-year renewal requirements

that creates the powerful (and insurmountable) barrier to entry for out-of-state residents that the legislature enacted. The various provisions enjoined by the courts below plainly work together and, indeed, the protectionist whole is greater than the sum of the component parts. In these circumstances, the Court cannot reach a conclusion "clear of doubt" that the legislature would have enacted the two-year durational residency requirement as a stand-alone provision and omitted the renewal requirements entirely, or that it would have enacted some residency requirement for business entities that did not include all of the applicant's officers, directors, and stockholders.

This Court frequently has held that it will not "rewrite a state law to conform it to constitutional requirements." *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988); *Ayotte*, 546 U.S. at 329. Yet TWSRA is asking the Court to do exactly that, and in a way that will require taking a scalpel to § 57-3-204(b)(2)(A) and (3)(A)-(B). The ten-year residency requirement for renewals is contained in the *same sentence* as the two-year requirement for initial applications in both § 204(b)(2)(A) and (3)(B). As a result, severance would require this Court to reach the highly improbable conclusion that one clause of a statutory sentence reflects protectionism and legislative arbitrariness, while the other clause does not. In addition, the 100% stockholder requirement could not be excised from the statute without redrafting it. See Pet. App. 54a (Judge Sutton suggesting that a 51% stockholder requirement might be constitutional). As a result, a judicial remedy would necessarily "entail quintessentially legislative work." *Ayotte*, 546 U.S. at 329.

The Court should invalidate Tennessee's constitutionally infirm residency scheme in its entirety. This is what the lower courts did, and their judgments should be affirmed.

IV. IF THE COURT OF APPEALS' DECISION IS REVERSED, THIS COURT SHOULD REMAND TO PERMIT THE LOWER COURTS TO CONSIDER TOTAL WINE'S PRIVILEGES AND IMMUNITIES CLAUSE CHALLENGE.

Total Wine argued in the district court and the court of appeals that Tennessee's durational residency requirements violate both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV of the federal Constitution. U.S. Const. art. IV, § 2, cl. 1; JA46-49. It contended that the requirements deprive Total Wine's individual owners of any opportunity to engage in a lawful business in Tennessee "on terms of substantial equality with the citizens of that State," a right protected by the Privileges and Immunities Clause. *Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 280 (1985); see also *Lebamoff Enters., Inc.* v. *Rauner*, No. 17-2495, 2018 WL 6191351, at *7-8 (7th Cir. Nov. 28, 2018) (reversing dismissal of out-of-state retailer's challenges to Illinois restrictions on direct shipment and remanding case for further consideration of claims presented under both the dormant Commerce Clause and the Privileges and Immunities Clause).

Total Wine briefed this issue in the lower courts, but the district court declined to reach it, Pet. App. 80a-81a, and the court of appeals did not address it. Accordingly, if this Court reverses the court of appeals' ruling on the dormant Commerce Clause, it ordinarily would and in this case should remand the case so that the district court can address this

independent constitutional challenge to Tennessee's durational residency requirements. See *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920-22 (2017) (remanding for consideration of an argument "never confronted" below).[11]

CONCLUSION

For the foregoing reasons, the decision below should be affirmed. If the Court reverses the decision below, it should remand for consideration of Total Wine's Privileges and Immunities Clause challenge.

Respectfully submitted,

WILLIAM J. MURPHY
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, MD 21202
(410) 332-0444

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
DEREK A. WEBB
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More

December 13, 2018

* Counsel of Record

---

[11] Total Wine obviously is not opposed to an affirmance on this ground or the alternative ground proposed by Affluere.

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Ave. North,
Suite 340-M
Nashville, TN 37201

Benjamin M. Flowers
JONES DAY
325 John H. McConnell
Blvd., Suite 600
Columbus, OH 43215

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

I. RESPONDENTS IGNORE THE TWENTY-FIRST AMENDMENT'S HISTORY 1

II. THIS COURT'S PRECEDENTS SUPPORT REVERSAL 7

III. TENNESSEE'S DURATIONAL-RESIDENCY REQUIREMENT IS JUSTIFIED ON POLICY GROUNDS 13

IV. RESPONDENTS' ALTERNATIVE BASES FOR AFFIRMANCE FAIL 21

A. This case no longer involves Tennessee's ten-year residency requirement applicable to license renewals 21

B. The Court should not address Respondents' Article IV or Fourteenth Amendment arguments 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Arnold's Wines, Inc. v. Boyle,
571 F.3d 18 (2d Cir. 2009) 13, 19

Bacchus Imps., Ltd. v. Dias,
468 U.S. 263 (1984) 8, 10, 11, 16

Brennen v. S. Express Co.,
90 S.E. 402 (S.C. 1916) 7

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,
476 U.S. 573 (1986) 11

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) ..... *passim*

Duckworth v. Arkansas,
314 U.S. 390 (1941) 18

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989) 8, 11

Hinebaugh v. James,
192 S.E. 177 (W.V. 1937) 15

Hostetter v. Idlewild Bon Voyage Liquor Corp.,
377 U.S. 324 (1964) 10

Heublein, Inc. v. South Carolina Tax Comm'n,
409 U.S. 275 (1972) 8, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Janus v. AFSCME,
138 S. Ct. 2448 (2018) 24

McBurney v. Young,
569 U.S. 221 (2013) 6

S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 17

Scott v. Donald,
165 U.S. 58 (1897) 3, 4

State Bd. of Equalization v. Young's Mkt.,
299 U.S. 59 (1936) 3, 24

Vance v. W.A. Vandercook Company,
170 U.S. 438 (1898) 5, 7

Walling v. Michigan,
116 U.S. 446 (1886) 3, 4

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 3

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. art. IV 23

1939 Tenn. Pub. Acts, ch. 49 ..... 20, 23

S.C. Code Ann. § 61-2-90 19

Tenn. Code Ann. § 57-3-204 ..... 15, 21, 22

Va. Code Ann. § 4.1-119 19

Va. Code Ann. § 4.1-207 19

Va. Code Ann. § 4.1-208 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Va. Code Ann. § 4.1-222 19

OTHER AUTHORITIES

B. Fosdick & A. Scott,
Toward Liquor Control (1933) 14

INTRODUCTION

History and precedent point to a rule that resolves this case: The Twenty-first Amendment permits states to regulate the in-state sale and distribution of alcohol without regard to the Commerce Clause, provided they treat in-state and out-of-state alcohol identically. Under this rule, durational-residency requirements do not violate the Commerce Clause, since they regulate the sale and distribution of alcohol without discriminating between in-state and out-of-state alcohol.

Respondents do not like this rule. But in 121 pages of combined briefing, they never settle on an alternative. Instead they vacillate between two inconsistent positions. Sometimes they argue that, regardless of the Twenty-first Amendment, the Commerce Clause dooms any law that discriminates between in-state and out-of-state economic interests—even though three-tier systems would fail this test. Elsewhere, they argue that the Twenty-first Amendment permits all laws relating to alcohol if they have any non-protectionist justification—even though Respondents lose under this rule. Along the way, they ignore the states' authority to regulate alcohol sales before Prohibition—even though *Granholm v. Heald*, 544 U.S. 460 (2005), interpreted the Twenty-first Amendment to restore that authority.

The Court should reverse the Sixth Circuit.

ARGUMENT

I. RESPONDENTS IGNORE THE TWENTY-FIRST AMENDMENT'S HISTORY.

Granholm requires interpreting the Twenty-first Amendment through a historical lens. It recognized

that § 2 "restored to the States" their pre-Prohibition power to regulate alcohol; specifically, the "powers they had under the Wilson and Webb-Kenyon Acts." *Id.* at 484. The Court then struck down two state laws that, in its view, would have been held unconstitutional in the years before Prohibition. *See id.* at 483–84, 488–89.

Total Wine and Affluere ignore the historical inquiry *Granholm* demands. Indeed, their briefs do not even cite the Wilson or Webb-Kenyon Acts. They thus implicitly concede that the history supports reversal: Tennessee's durational-residency requirement passes constitutional muster under *Granholm*'s historical approach and (therefore) under the Twenty-first Amendment.

A. The Twenty-first Amendment "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts." *Id.* at 484. Those Acts—which Congress enacted in response to rulings by this Court limiting state power to regulate out-of-state alcohol—together made it illegal to transport alcohol into a state where its use or sale would be illegal. *See* Opening Br. 25–28. Combined with the states' preexisting powers to regulate purely in-state sales, the Acts left the states with "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488. The qualifier "virtually" is needed because neither the Wilson nor the Webb-Kenyon Act permitted states to treat imported liquor differently than "its domestic equivalent." *Id.* at 489. But aside from that restriction, states could regulate alcohol use and distribution even in ways that would otherwise violate the dormant Commerce Clause.

After ratification, courts understood the Twenty-first Amendment to restore this status quo, allowing states to regulate the consumption and distribution of liquor "unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). In the words of Justice Brandeis—writing for a unanimous Court just three years after ratification—allowing the Commerce Clause to limit states' § 2 authority "would involve not a construction of the amendment, but a rewriting of it." *State Bd. of Equalization v. Young's Market*, 299 U.S. 59, 62 (1936)

The states, like the courts, took the Twenty-first Amendment to mean "that the regulation of sales of alcohol *within* the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power." Pet.App.44a (Sutton, J., dissenting). This understanding is reflected in the many state laws, passed immediately after ratification, imposing residency requirements in general and durational-residency requirements in particular on liquor retailers. *See* Opening Br. 33–34 (collecting examples).

B. Respondents completely ignore these state laws, and they never even cite the Wilson and Webb-Kenyon Acts. The closest they come to addressing this dispositive history is Total Wine's discussion of *Walling v. Michigan*, 116 U.S. 446 (1886), and *Scott v. Donald*, 165 U.S. 58 (1897). Both cases are consistent with the just-described understanding of the Twenty-first Amendment.

Walling struck down a Michigan state tax applicable only to out-of-state wholesalers and salespeople. 116 U.S. at 446–47. According to Total Wine, *Walling*

stands for the broad proposition that, before Prohibition, states had no power to "discriminate against nonresident owners of alcohol businesses." Total Wine Br. 39. But *Walling* pre-dated the Wilson and Webb-Kenyon Acts—indeed, it was part of the line of dormant Commerce Clause cases that those Acts overruled. *See Granholm*, 544 U.S. at 477–78. So it says nothing about the question *Granholm* deemed dispositive: what "powers" the states had "under the Wilson and Webb-Kenyon Acts." *Id.* at 484.

Now consider *Scott*. It struck down a law that created a state-run retail monopoly overseen by a commissioner who: (1) had to purchase his supplies from in-state producers if their products met quality and price requirements, and (2) could impose a higher mark-up on imported wines than domestic wines. 165 U.S. at 92–93. Both provisions, *Scott* held, violated the dormant Commerce Clause by giving preferential treatment to in-state products. *Id.* at 100. And while the Wilson Act created some exceptions to the Commerce Clause, it still required that imported and domestic goods receive equal treatment. *Id.*

According to Total Wine, *Scott* shows that states had no power to discriminate against "out-of-state business owners" before Prohibition. Total Wine Br. 40. Not so. As *Granholm* explained, *Scott* held only that "the Wilson Act was 'not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden.'" 544 U.S. at 479 (quoting *Scott*, 165 U.S. at 100). *Scott* recognized the very same exception to the Wilson Act that *Granholm* recognized under the Twenty-first Amend-

ment a century later: States must treat imported alcohol "the same as its domestic equivalent." *Id.* at 489. It does not follow that *all* burdens falling unequally on out-of-state business owners are unlawful. States *could* favor in-state residents when regulating the in-state sale and distribution of alcohol, as long as they treated in-state and out-of-state alcohol the same way.

Vance v. W.A. Vandercook Company, 170 U.S. 438 (1898), confirms this pre-Prohibition understanding. That case rejected a challenge to South Carolina's state-run monopoly. The challenger argued that such monopolies were "inherently discriminatory," in violation of the Commerce Clause, because state agents tend to prefer in-state goods out of loyalty. *Id.* at 450–51. But if that were right, the Court said, then the same would be true of a law that "authorized only residents to be licensed to sell liquor, and restricted the number of such licenses." *Id.* at 451. Since it would be absurd to hold that states could not pass such a law, the challenge to the state-run monopoly failed. *Id.* This reasoning—dismissed as mere dicta, *see* Total Wine Br. 40–41 n.9—speaks volumes about the constitutionality of residency requirements in the years before Prohibition. This Court viewed them as so obviously constitutional that any rule that would call them into question could not possibly be the law. That is strong evidence that states had power to impose them before the Eighteenth and after the Twenty-first Amendments.

C. One amicus, the National Association of Wine Retailers, tries to fill the historical gap in Respondents' briefs. The Wine Retailers charge the Associa-

tion with reading the Twenty-first Amendment to distinguish between producers and retailers, leaving the dormant Commerce Clause in place only for the former. This, they say, conflicts with the Commerce Clause's original meaning, under which retail sales were "commerce," while manufacture and production were not. Wine Retailers Br. 13.

It is strange to talk about the "original meaning" of the Commerce Clause in this case, since there was no *dormant* Commerce Clause as an original matter. *See McBurney v. Young*, 569 U.S. 221, 237 (2013) (Thomas, J., concurring). Regardless, the Wine Retailers' argument addresses a straw man. The Association's position is not that the Twenty-first Amendment applies to producers rather than retailers. It is that the Twenty-first Amendment immunizes states from dormant Commerce Clause scrutiny when they regulate alcohol on terms that "treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. This rule applies not to the states' regulation of alcohol *production*, but rather to their regulation of the sale and distribution of alcohol *after* production—and it applies to all laws governing sale and distribution, whether they involve producers, retailers, or anyone else. Sale and distribution are indisputably "commerce." Thus, *Granholm* subjects only "commerce" to Commerce Clause scrutiny, consistent with that clause's original meaning.

The Wine Retailers also argue that the Wilson and Webb-Kenyon Acts "did not cede to states the novel and untrammeled authority to intrude upon the traditionally plenary federal power to regulate interstate commerce." Wine Retailers Br. 24. Again, however, the Wine Retailers misstate the Association's position.

The Association recognizes that neither Act conferred "upon any state the power to make injurious discriminations *against the products* of other states." *Brennen v. S. Express Co.*, 90 S.E. 402, 404 (S.C. 1916) (emphasis added) (quoted at Wine Retailers Br. 23–24). At the same time, neither Act displaced the states' pre-existing power to regulate the purely *in-state* sale of alcohol—which is why *Vance* acknowledged the permissibility of residency requirements for retailers. Neither the Wine Retailers nor anyone else has come up with any contrary evidence.

* * *

There is no serious dispute that Tennessee's durational-residency requirement would have been upheld in 1917 or 1934. Consistent with *Granholm's* historical inquiry, it must be upheld in 2019 as well.

II. THIS COURT'S PRECEDENTS SUPPORT REVERSAL.

A. Because *Granholm* made clear that the Twenty-first Amendment restored to states the powers they had under the Wilson and Webb-Kenyon Acts, the historical and precedential inquiries merge. As *Granholm* recognized, the Wilson and Webb-Kenyon Acts granted states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." 544 U.S. at 488. In particular, states were free to regulate the in-state sale and use of alcohol so long as they did not "discriminate[] against liquor produced out of state." *Id.* at 483. That line makes sense: The Twenty-first Amendment, like the temperance movement that ultimately produced it, responded not to

problems with the production of alcohol, but to the consequences of its sale and use.

Although *Granholm* did not frame the rule in terms of "core" versus "non-core" Twenty-first Amendment authority, that terminology, drawn from prior cases, reflects the same principle. Put in those terms, states are unfettered by the dormant Commerce Clause when they exercise their "core § 2 power": the power "directly to regulate the sale or use of liquor within [their] borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984).

In applying that principle, this Court has *never* struck down a core law on dormant Commerce Clause grounds. Instead, it has consistently recognized that state laws that "funnel sales through [a] three-tier system" are "'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). *See also, e.g., Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 277, 283–84 (1972) (upholding laws that allowed producers to transfer liquor to in-state wholesalers only through a "resident representative"); Opening Br. 37–39.

By contrast, this Court (since the 1960s) has *always* applied dormant Commerce Clause scrutiny to laws that fall outside that sphere of core authority. *See* Opening Br. 40–43. It has most often applied that scrutiny to laws that regulate out-of-state alcohol distribution. *See, e.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324, 343 (1989). Most recently, the Court has done so in the context of laws that fail to "treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489; *accord Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 265 (1984).

B. Respondents offer no coherent alternative to this Court's core-versus-non-core approach—much less a rule for adjudicating dormant Commerce Clause challenges to in-state liquor regulations going forward. No version of their position can be reconciled with *Granholm* and its forebears.

1. Throughout most of their briefs, Respondents appear to argue that the dormant Commerce Clause's non-discrimination principle applies in full to all alcohol-related regulations, the Twenty-first Amendment notwithstanding. The Court's precedents foreclose ascribing so little force to the Twenty-first Amendment.

For one thing, this rule leaves no continuing role for § 2 of the Twenty-first Amendment in dormant Commerce Clause analysis. That contradicts the Court's repeated recognitions that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities*, 467 U.S. at 712. It also ignores the reality that alcohol is different—it caused such significant problems that the People adopted an amendment altering the dormant Commerce Clause's normal operation.

For another thing, this rule would render *all* residency requirements invalid—including non-durational ones. Indeed, Respondents' rule would make three-tier systems unconstitutional, since the residency requirements "inherent in" those "system[s]," Total Wine Br. 2, contradict the non-discrimination principle by treating in-state economic interests more favorably than out-of-state interests. So if Respondents are right, the Court has repeatedly erred by recognizing the "'unquestion[ed] legitima[cy]'" of state laws that "funnel sales through [a] three-tier system." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*,

495 U.S. at 432 (plurality op.)). Not even Respondents, who concede the constitutionality of non-durational residency requirements and three-tier systems, Total Wine Br. 2, embrace that result.

Respondents' position is equally inconsistent with another residency requirement that this Court already upheld. In *Heublein*, which Respondents never discuss, the Court upheld laws requiring producers to transfer liquor through a "resident representative," reasoning that the "resident representative" process was "an appropriate element in the State's system of regulating the sale of liquor"—and thus shielded by the Twenty-first Amendment from dormant Commerce Clause scrutiny. 409 U.S. at 277, 283. Had the non-discrimination principle applied in full, that law would have been held invalid.

2. Respondents sometimes step back from their broad rule, suggesting that even facially discriminatory liquor laws are constitutional unless they "have no purpose other than protecting in-state businesses." Total Wine Br. 34. But Respondents do not even attempt to ground that rule in the pre-Prohibition Wilson and Webb-Kenyon framework, which controls under the holding in *Granholm*. 544 U.S. at 484–85. And it is irreconcilable with the long line of precedents holding that it is "unquestioned" that states are uninhibited by the dormant Commerce Clause when they exercise their core § 2 "power to restrict, regulate, or prevent the traffic and distribution of intoxicants within [their] borders." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *see also Capital Cities*, 467 U.S. at 713.

Moreover, the cases on which Respondents' protectionist-based theory primarily rests, *Bacchus*, 468

U.S. 263, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy*, 491 U.S. 324, stand for nothing of the sort. *Bacchus* held only what *Granholm* did: The Twenty-first Amendment is inapplicable to laws that discriminate against out-of-state alcohol. *See* Opening Br. 42–43. Similarly, *Brown-Forman* and *Healy* stand only for the proposition that laws fall outside states' core Twenty-first Amendment authority when they have the "inherent practical extraterritorial effect of regulating liquor prices in other States." *Healy*, 491 U.S. at 343; *Brown-Forman*, 476 U.S. at 585. The Twenty-first Amendment gives states no power to regulate outside their borders, so even laws relating to subjects *otherwise* within the core of the Twenty-first Amendment (such as price) fall outside that core if they have an extraterritorial effect. *Contra* Total Wine Br. 45 (claiming that these cases involve the exercise of "core" Twenty-first Amendment power). There is thus nothing controversial about *Granholm*'s citing *Healy* and *Brown-Forman* in support of the conclusion "that the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." 544 U.S. at 488. Insofar as Justice Scalia's opinion concurring in the judgment in *Healy* endorsed a broader rule, *see* Total Wine Br. 32–33, that view garnered a single vote.

But the Court need not decide whether the Twenty-first Amendment incorporates a free-floating economic-protectionism exception, since Tennessee's law survives that test. *See* Opening Br. 47–51; *infra* 13–21.

3. Finally, both Respondents pluck individual lines from *Granholm* and, taking them out of context, try to extract from that decision the most favorable

possible holding. That is no way to discern a holding. Instead, one must consider the case's language in its context. The context in *Granholm* consisted of a long historical analysis, which showed that the Twenty-first Amendment creates no Commerce Clause exception to laws that discriminate against out-of-state alcohol. 544 U.S. 476–86. In light of that context, the Court held that state laws allowing only in-state producers to sell wine directly to consumers violate the dormant Commerce Clause because those laws "discriminate[] against liquor produced out of state." *Id.* at 483. Of course, the very same history confirms that state laws regulating in-state distribution and sale of alcohol "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent"—which is why *Granholm* recognized the validity of these laws. 544 U.S. at 489. In other words, the Twenty-first Amendment protects laws enacted pursuant to states' core § 2 power: the power "directly to regulate the sale or use of liquor within [their] borders." *Capital Cities*, 467 U.S. at 713. That rule resolves this case.

* * *

Granholm requires courts to assess the legality of state liquor laws using its historical approach. That approach results in a clean rule, which is fully consistent with the core–versus–non-core test embraced in earlier precedents: The Twenty-first Amendment permits states to regulate the in-state sale and distribution of alcohol without regard to the Commerce Clause so long as they do not differentiate between in-state and out-of-state alcohol. That is the best available synthesis of this Court's precedents, especially

when compared with Respondents' inconsistent alternatives. Even if language in a few of those precedents does not fit perfectly in that mold, there is no reason to extend those statements to further undermine the historical understanding of the Twenty-first Amendment and the powers it conferred upon the states. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 18, 192–201 (2d Cir. 2009) (Calabresi, J., concurring) (endorsing this general approach).

III. TENNESSEE'S DURATIONAL-RESIDENCY REQUIREMENT IS JUSTIFIED ON POLICY GROUNDS.

Because Tennessee exercised its core Twenty-first Amendment power when it enacted its durational-residency requirement, the policy justifications for that requirement are irrelevant. That is the whole point of § 2: State legislatures, not federal courts, get to weigh pros and cons and decide "how to structure [state] liquor distribution system[s]" given the preferences and needs of their populations. *Granholm*, 544 U.S. at 488. But even if core laws justified only by economic protectionism are unconstitutional, Tennessee's two-year durational-residency requirement is constitutional.

A. Durational-residency requirements like Tennessee's serve at least four overlapping policy goals.

First, residency requirements ensure that liquor retailers know their community, "are known by the[ir] community," and "have a demonstrated stake in th[eir] community's well-being." States Br. 20; *see also* Opening Br. 48–49. And residing in a community for a meaningful period of time further strengthens

that bond. That matters because the dangers of alcohol are communal; the drunk driver puts not only himself at risk, but all those with whom he shares the streets. So too for the domestic abuser and the underage drinker. "An absentee owner without a relationship to the local community" does not share in these risks and, as a result, "is less likely to be invested in the community's well-being." States Br. 20; *see also* B. Fosdick & A. Scott, *Toward Liquor Control* 29 (1933) ("The 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence.").

While it is true that many *employees* are local residents even if the license holder is not, *see* Total Wine Br. 24, an employee's job is to please his boss. Tennessee's durational-residency requirement helps align the community's interest with that of the employer, and thus the employee. It helps ensure those who control liquor retailers—those in the best "position to alter or influence the retailer's behavior"—have an interest in the communities where their businesses operate. Pet.App.51a (Sutton J., dissenting). Retailers who are invested in the community's well-being have an incentive to sell responsibly that goes above and beyond a fear of getting caught and penalized for legal non-compliance. *Contra* Law & Economics Scholars Br. ("L&E Br.") 17–20 (ignoring this incentive).

Second, residency requirements facilitate state regulation and monitoring of liquor-retail operations. Opening Br. 47–48; States Br. 14–19. The Tennessee

legislature specifically cited its interest in "maintain[ing] a higher degree of oversight" in support of its durational-residency requirement. Tenn. Code Ann. § 57-3-204(b)(4). That interest is especially important as applied to retailers given the lack of federal regulation at that tier. *See* States Br. 15. And requiring retailers to reside in-state directly serves states' oversight interest because in-person books and premises "inspections are the lynchpin of enforcing state alcohol regulations." National Alcohol Beverage Control Association ("NABCA") et al. Br. 15. "[I]t is simply not possible" for state regulators "to traverse the country inspecting retailers or speaking to far-flung owners," States Br. 7—especially since those regulators "are already overburdened" and under-resourced, NABCA Br. 15. *Durational*-residency requirements, moreover, are particularly useful at the application stage, because they make it more likely that community members will have had a chance to *observe* the applicant's character. *See Hinebaugh v. James*, 192 S.E. 177, 178 (W.V. 1937). This gives the state an opportunity to receive and assess relevant information unlikely to show up in a background check, *contra* Cato Institute Br. 14—for example, whether the applicant is a threat unlawfully to run the business "on behalf of another." Tenn. Code. Ann. § 57-3-204(b)(2)(G).

Third, residency requirements ensure that retailers can be held accountable when they fail to adhere to state regulatory requirements. Opening Br. 48; States Br. 19; *Hinebaugh*, 192 S.E. at 178. Again, Tennessee's legislature recognized this in its statement of legislative purpose. Tenn. Code Ann. § 57-3-204(b)(4) ("[I]t is in the interest of this state to main-

tain a higher degree of . . . accountability for individuals involved in the ownership, management and control of licensed retail premises."). And it is easy to see how holding liquor retailers accountable is "far easier when the owners live in the State." States Br. 19. That is particularly true when they have resided in-state for some time, so that they are less likely to move outside the state's jurisdiction, and more likely to have substantial in-state assets "that can be attached by enforcement agents in an *in rem* proceeding"—an important enforcement tool in regulators' arsenal. NABCA Br. 17.

Fourth, durational-residency requirements advance "the core state interest of promoting temperance," States Br. 20, for the simple reason that they make it harder to sell—and thus purchase—alcohol. Opening Br. 50–51. Respondents and their amici hope to make alcohol as cheaply and as widely available as possible. For instance, the economists bemoan "increased prices," L&E Br. 15, while others complain that they cannot easily track down "a 1998 Chateau Margaux" or a "highly rated Kistler Chardonnay," 81 Wine Consumers Br. 1. But promoting temperance was the animating purpose of the Twenty-first Amendment. *See Bacchus*, 468 U.S. at 276; Opening Br. 50–51; Center for Alcohol Policy Br. 14–19. And it is exactly what Tennessee legislators said they intended to do when debating the residency requirements on the House floor. *See* BIO.App.9a.

Respondents must concede that these legitimate state interests justify *residency* requirements—such requirements serve precisely these purposes, and Respondents (purport to) accept the constitutionality of "in-state presence requirements." Total Wine Br. 2.

The constitutionality of *durational*-residency requirements, which bolster the same interests even more, follows directly. After all, the state gets to decide what it means to be a resident for a particular purpose. If, as *Granholm* made clear, "it is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause, then . . . States [must] have flexibility to define the requisite degree of 'in-state' presence" for purposes of liquor licensing—no less than they do for other purposes, like receiving in-state tuition discounts or being eligible to obtain a state-sanctioned divorce. *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013).

B. Respondents nevertheless complain that Tennessee failed to *prove* that its law has had its intended effect, and they speculate that the State could have achieved its goals through other means. Total Wine Br. 22–27.

Although they never come out and say it, Respondents are asking this Court to subject core Twenty-first Amendment regulations like Tennessee's to narrow-tailoring review. On the one hand, they contend that Tennessee's durational-residency requirement is overbroad because the State could, for example, have required that a store's general manager and employees reside in Tennessee. *Id.* at 24. On the other hand, they assert that Tennessee's law is underinclusive because it neither demands residence in a particular municipality nor applies to bars or restaurants. *Id.* at 24–26. To top it off, they insist that the State ought to have made "an evidentiary showing in the district court in support of any purported state interests." *Id.* at 23.

Those are textbook narrow-tailoring arguments. But this Court has *never* undertaken a reasonableness review—much less a narrow-tailoring review—of a law "regulat[ing] the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. For good reason. As the failure of nationwide Prohibition showed, there is no one-size-fits-all solution to alcohol. Opening Br. 30–32. Thus, § 2 of the Twenty-first Amendment gives states wide berth to craft regulatory regimes that *they* deem appropriate to protect their citizens from the inherent risks of drinking. It does not require perfection. It does not require "concrete record evidence." Total Wine Br. 23. And it does not permit courts to substitute their own judgment for that of state legislatures. Indeed, the Twenty-first Amendment creates "an important distinction between state power over the liquor traffic and state power over commerce in general" *precisely because* of Americans' "unsatisfactory experience" with judicial interference regarding state liquor policy. *Duckworth v. Arkansas*, 314 U.S. 390, 398–99 (1941) (Jackson, J., concurring in result). Respondents' call for narrow tailoring involves precisely the sort of judicial examination that the Amendment sought to prevent.

Were this Court to take the unprecedented step of requiring states to narrowly tailor regulations governing in-state liquor distribution, it would leave no continuing role for § 2 of the Twenty-first Amendment. Alcohol, from the perspective of the dormant Commerce Clause, would be no different from any other product. Again, that is not the law.

Moreover, as a practical matter, adopting Respondents' approach would inundate courts with dormant Commerce Clause challenges to other state

laws regulating the in-state sale or use of liquor. Those laws include a wide variety of residency-related requirements, durational and otherwise, *see* States Br. 22–25, each of which, in Respondents' view, would apparently require individualized, evidence-based review to determine whether a less-restrictive alternative would be workable. If Tennessee's two-year requirement is too restrictive, what about South Carolina's 30-day requirement? *See* S.C. Code Ann. § 61-2-90(5). What about Virginia's system, which prohibits private sales of spirits and includes a one-year residency requirement for beer and wine retailers? *See* Va. Code Ann. §§ 4.1-119, 207, 208, 222(B). Respondents' preferred alternatives to durational-residency requirements—like requiring an in-state general manager or requiring out-of-state retailers to post bonds—would pose a whole new set of questions. But courts are in no better position than state legislatures to undertake a rigorous evaluation of these sorts of nuanced policy judgments. Inviting such review would "permit courts ... to substitute their own notions of modern needs for those of the majority"—a result that is particularly problematic given that the constitutional valence of such judicial decisions "may remove serious issues from the democratic process and from legislative deliberation." *Arnold's Wines*, 571 F.3d at 200 (Calabresi, J., concurring).

Respondents' amici argue that the states cannot be trusted with the power the Twenty-first Amendment gave them. They claim that Tennessee's residency requirement is a case in point, since it has "all the hallmarks of rent-seeking legislation intended to transfer wealth from consumers to an entrenched spe-

cial interest." L&E Br. 10. That would be legally irrelevant if it were true; the Constitution no more enacts Mr. James Buchanan's public-choice theory than Mr. Herbert Spencer's Social Statics. But it is not true. Tennessee first imposed its durational-residency requirement in the same bill that legalized alcohol, 1939 Tenn. Pub. Acts, ch. 49, § 8, which means there was no "entrenched and politically powerful industry," L&E Br. 5, to lobby for its passage. This history shows the limits of abstract theorizing. And much of the theorizing is unpersuasive even on its own terms. Take, for example, the same scholars' assertion that upholding the law will inevitably lead states to pass even more such laws to benefit local companies. L&E Br. 21. Why? Surely major interstate retailers like Total Wine are politically powerful, too.

C. Total Wine fixates on a former Tennessee Attorney General's apparent disagreement with the legislature's view of the wisdom of a two-year durational residency requirement. But Tennessee's legislature, not its Attorney General, gets to decide how alcohol sales should be regulated within state borders. The Tennessee Attorney General's analysis of federal constitutional law is entitled to no special weight here.

Insofar as the views of Tennessee officeholders matter to the constitutional question at hand, the *current* Tennessee Attorney General filed a letter with this Court expressing "strong[]" support for the view that Tennessee's durational-residency requirement is constitutional and adopting the Association's merits argument, "which fully represents Tennessee's position." Ltr. of Resp. Byrd 12. Despite Total Wine's potshots, the State's decision to allow the Association—

who has been an active party to this case from the outset—to take the laboring oar and to spare this Court from duplicative briefing has no bearing on the constitutionality of Tennessee's durational-residency requirement. And the amicus brief filed by 35 states and the District of Columbia leaves no doubt about the states' interest in preserving the Twenty-first Amendment.

IV. RESPONDENTS' ALTERNATIVE BASES FOR AFFIRMANCE FAIL

A. This case no longer involves Tennessee's ten-year residency requirement applicable to license renewals.

This case is about the two-year residency requirement in Tenn. Code. Ann. § 57-3-204. Tennessee law also imposed a ten-year residency requirement for license renewals. The Sixth Circuit struck down both requirements. It erred in doing so: However the ten-year provision would fare if there were an economic-protectionism exception to the Twenty-first Amendment, there is no such carve-out. *See* Opening Brief 43–44. But the Association opted to avoid that question—and limit this case to the kind of residency requirement on which the courts of appeals are squarely divided—by seeking and obtaining review only of the two-year requirement applicable to individuals and to corporate officers and directors. *See* Cert. Reply 2–3.

Despite the Association's decision to challenge only this aspect of the Sixth Circuit's decision, Respondents insist that the two-year residency requirement cannot be considered independently.

First, Total Wine argues that because the Sixth Circuit's judgment struck down the two-year *and* the

ten-year provisions, it is "procedurally improper" to defend only the former. Total Wine Br. 52. This is hard to understand. The Court often reverses a judgment only in part, and it is not "improper" to request that relief. Total Wine says this amounts to a request for "an advisory opinion on whether a hypothetical state statute" is constitutional. *Id.* at 52–53. But there is nothing advisory about seeking reversal of an actual judgment holding several actual provisions of an actual Tennessee law unconstitutional.

Second, Total Wine claims that since it already obtained its initial license after the district court's decision, the case now turns, "in substantial part, on the validity of the ten year renewal requirement." *Id.* at 53. That is wrong: Total Wine must surrender its current license if the two-year provision is valid. Tennessee law provides that "[n]o retail license . . . may be . . . *held by*" anyone "[w]ho at the time of application for renewal of any license under this section would not be eligible for the license upon a first application." Tenn. Code. Ann. § 57-3-204(b)(2)(H). Since Total Wine does not satisfy the two-year requirement applicable to those seeking a "license upon a first application," and because it will not meet that requirement on the date of renewal, it cannot lawfully hold its current license if the two-year requirement is valid. The ten-year requirement is irrelevant.

Finally, Total Wine argues that the entire statute must be considered together, because the two-year residency requirement that the Association defends is not severable. Total Wine Br. 53–55. The Sixth Circuit already held, unanimously, that Tennessee's general severability statute permits severing the unconstitutional portions of § 57-3-204 from the rest.

Pet.App.33a–37a; Pet.App.40a (Sutton, J., dissenting). Rightly so. Tennessee's severability statute provides: "It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable . . . and any of them shall be exscinded if the code would otherwise be unconstitutional." Pet.App.35a (quoting Tenn. Code. Ann. § 1-3-110). Any unconstitutional "parts" of the residency requirements are thus severable from the constitutional parts. Indeed, Tennessee first enacted its two-year requirement independently of the ten-year renewal requirement, *see* 1939 Tenn. Pub. Acts, ch. 49, § 8, so there is no doubt that "the legislature would have enacted the act in question" even "with the [allegedly] unconstitutional portion omitted," Total Wine. Br. 54 (quoting *In re Swanson*, 2 S.W. 3d 180, 189 (Tenn. 1999)). Of course, if the Court doubts this, it can vacate the judgment below and leave severability for remand. *Id.*

B. The Court should not address Respondents' Article IV or Fourteenth Amendment arguments.

Total Wine seeks a remand on whether the durational-residency requirement is unconstitutional under the Privileges and Immunities Clause, U.S. Const. art. IV, § 2. Because the lower courts never addressed this argument, and because it is outside the scope of the question presented, it would be appropriate for this Court to leave it for remand.

The same is not true for Affluere's argument that the durational-residency requirement violates the Fourteenth Amendment's Privileges *or* Immunities Clause. Like Total Wine's Article IV argument, this one was not decided below and is outside the scope of

the question presented. But unlike Total Wine's argument, Affluere *cannot* press this one on remand. Affluere forfeited it by failing to raise it in the District Court, the Sixth Circuit, or a certiorari-stage brief. Regardless, this Court should "not engage" in Affluere's "halfway originalism." *Janus v. AFSCME*, 138 S. Ct. 2448, 2469 (2018). Affluere devotes page after page to its originalist argument about the Privileges or Immunities Clause, but altogether ignores the original meaning and history of the amendment that this Court granted certiorari to address. There is little doubt that, when *both* provisions are given their original meanings, the Association must prevail: "A classification permitted by Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." *Young's Market*, 299 U.S. at 64.

CONCLUSION

The Sixth Circuit erred in striking down Tennessee's two-year residency requirement for individuals, corporate officers, and corporate directors. This Court should reverse.

January 4, 2019

Respectfully submitted,

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Ave. North,
Suite 340-M
Nashville, TN 37201

Benjamin M. Flowers
JONES DAY
325 John H. McConnell
Blvd., Suite 600
Columbus, OH 43215

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Petitioner

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF AMERICAN BEVERAGE LICENSEES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SCOTT A. KELLER
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-7700
scott.keller@bakerbotts.com

TRAVIS L. GRAY
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, TX 77002

Counsel for Amicus Curiae

Wilson-Epes Printing Co., Inc. – (202) 789-0096 – Washington, D.C. 20002

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Residency requirements are an essential and beneficial part of a State's three-tier system for alcohol distribution 5

II. The dormant Commerce Clause applies differently in the unique context of state alcohol regulations under the Twenty-first Amendment 10

III. *Granholm* v. *Heald*'s holding is limited to protectionist laws that discriminate against out-of-state producers and products. 13

IV. The Sixth Circuit's expansion of *Granholm* to in-state retailers would eviscerate the three-tier system that this Court has already held "unquestionably legitimate." 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

44 Liquormart, Inc. v. *Rhode Island*,
517 U.S. 484 (1996) 12

Arnold's Wines, Inc. v. *Boyle*,
571 F.3d 185 (2d Cir. 2009) 19

Bacchus Imports, Ltd. v. *Dias*,
468 U.S. 263 (1984) 17

Brooks v. *Vassar*,
462 F.3d 341 (4th Cir. 2006) 19

Brown-Forman Distillers Corp. v. *N.Y. State Liquor Authority*,
476 U.S. 573 (1986) 17

Cal. Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*,
445 U.S. 97 (1980) 11

Capital Cities Cable, Inc. v. *Crisp*,
467 U.S. 691 (1984) 11, 12, 13

Carter v. *Virginia*,
321 U.S. 131 (1944) 6

Craig v. *Boren*,
429 U.S. 190 (1976) 11, 15

Duckworth v. *Arkansas*,
314 U.S. 390 (1941) 12

Granholm v. *Heald*,
544 U.S. 460 (2005) ..... *passim*

Healy v. *Beer Inst., Inc.*,
491 U.S. 324 (1989) 18

Heublein, Inc. v. *S.C. Tax Comm'n*,
409 U.S. 275 (1972) 13

Hostetter v. *Idlewild Bon Voyage Liquor Corp.*,
377 U.S. 324 (1964) 11

Norris v. *Grimsley*,
585 P.2d 925 (Colo. App. 1978) 10

North Dakota v. *United States*,
495 U.S. 423 (1990) ..... *passim*

Or. Waste Sys., Inc. v. *Dep't of Envtl. Quality of the State of Or.*,
511 U.S. 93 (1994) 12

Rice v. *Rehner*,
463 U.S. 713 (1983) 5

S. Wine & Spirits of Am., Inc. v. *Div. of Alcohol & Tobacco Control*,
731 F.3d 799 (8th Cir. 2013) 6, 8, 9

Scott v. *Donald*,
165 U.S. 58 (1897) 16

Tiernan v. *Rinker*,
102 U.S. 123 (1880) 16

Walling v. *Michigan*,
116 U.S. 446 (1886) 16

William Jameson & Co. v. *Morgenthau*,
307 U.S. 171 (1939) 20

STATUTES

27 U.S.C. § 121 20

27 U.S.C. § 122 20

27 U.S.C. § 122a 20

27 U.S.C. § 201 20
42 U.S.C. § 290bb-25b 11, 20
Tenn. Code § 57-3-204 ..... 6, 8, 10
Tenn. Code § 57-3-208 7
Tenn. Code § 57-3-211 7
Tenn. Code § 57-3-221 7

IN THE

Supreme Court of the United States

NO. 18-96

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF AMERICAN BEVERAGE LICENSEES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae American Beverage Licensees (ABL) is an association representing licensed off-premises alcohol retailers (such as package liquor stores) and on-premises alcohol retailers (such as bars, taverns, and restaurants) across the nation. ABL was created in 2002 after the merger of the National Association of Beverage Retailers and the National Licensed Beverage

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Association. ABL has about 15,000 members in 35 States. Many of ABL's members are independent, family-owned operations who ensure that beverage alcohol is sold and consumed responsibly by adults in conformity with the laws of the State in which each member does business.

ABL monitors federal legislation, judicial decisions, and trends of concern to beverage alcohol retailers. ABL is strongly committed to working with others under effective regulation toward the responsible sale of beverage alcohol products. ABL supports state laws concerning the structure of a State's beverage alcohol distribution system.

SUMMARY OF ARGUMENT

This Court has held multiple times that "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." *Granholm* v. *Heald*, 544 U.S. 460, 466 (2005). For decades, many States have had such three-tier systems—requiring separate producers, wholesalers, and then retailers for alcohol distribution. And residency requirements for retailers and wholesalers have been essential and beneficial parts of this three-tier system. Requiring in-state alcohol retailers and wholesalers furthers legitimate state interests in "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality op.). States can ensure proper enforcement of their own alcohol regulations much more easily and effectively by requiring in-state residency for wholesalers or retailers.

With these benefits of the three-tier system in mind, this Court has recognized that the dormant Commerce Clause applies differently in the unique context of state alcohol regulation under the Twenty-first Amendment. This constitutional font of power stands as an exception to the typical operation of the dormant Commerce Clause. While the Court has held that the Commerce Clause overrides certain state alcohol regulations, precedent also clarifies that the Commerce Clause does not displace a State's use of core Twenty-first Amendment powers—such as direct regulation of the sale or use of alcohol within a State's borders.

Accordingly, *Granholm* v. *Heald*'s holding—about when state alcohol laws can treat in-state and out-of-state entities differently—was expressly limited to the first tier of alcohol *producers*. *Granholm* reaffirmed the three-tier system is "unquestionably legitimate." 544

U.S. at 489. And the Court acknowledged that "[t]he Twenty-first Amendment * * * empowers [a State] to require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler." *Ibid.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)) (emphasis added). In contrast, what *Granholm* said a State cannot do is exempt in-state alcohol producers from the three-tier system's requirements (of using in-state wholesalers and retailers), while demanding that out-of-state producers adhere to the three-tier system (and use in-state wholesalers and retailers). *Granholm*'s express holdings referred multiple times to "producer" or "product," confirming that the case dealt with just that first tier of alcohol production—and not the subsequent wholesaler or retailer tiers. Moreover, the Court's historical analysis recognized this line between producers versus subsequent tiers in alcohol distribution systems, as *Granholm* held that the Twenty-first Amendment incorporated precedents dealing with just producers.

In all events, *Granholm* should not be expanded to invalidate laws requiring in-state alcohol retailers, as this would eviscerate the three-tier system that has existed for decades. Any expansion of *Granholm* to cover retailers would call into question the Court's repeated admonition—even in *Granholm* itself—that the three-tier system is constitutional. The Court should avoid setting its precedents on that collision course by upholding the state residency requirement here for alcohol retailers.

ARGUMENT

I. RESIDENCY REQUIREMENTS ARE AN ESSENTIAL AND BENEFICIAL PART OF A STATE'S THREE-TIER SYSTEM FOR ALCOHOL DISTRIBUTION.

Time and again, this Court has reaffirmed "that States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." *Granholm*, 544 U.S. at 466 (citing *North Dakota*, 495 U.S. at 432 (plurality op.); *id.* at 447 (Scalia, J., concurring in the judgment)). That is, States can "regulate the sale and importation of alcoholic beverages" by requiring "[s]eparate licenses" for "producers, wholesalers, and retailers"—all through "a complex set of overlapping state and federal regulations." *Ibid.* *Granholm* made clear "that the three-tier system itself is 'unquestionably legitimate.'" *Id.* at 489 (citing *North Dakota*, 495 U.S. at 432 (plurality op.); *id.* at 447 (Scalia, J., concurring in the judgment)). And it acknowledged that these valid forms of state-based alcohol regulation empower States "to require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler." *Ibid.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)) (emphasis added).

These constitutional residency requirements—mandating in-state alcohol wholesalers and retailers—further essential and beneficial state interests. The three-tier system's multi-step, comprehensive regulatory system advances a State's interest in "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432 (plurality op.); see *Rice* v. *Rehner*, 463 U.S. 713, 724 (1983) ("The State has an unquestionable interest in the liquor traffic that occurs within its borders").

By requiring distribution to occur through entities with sufficient connections to a State, that State can best enforce its own alcohol regulations. For example, States can more easily inspect in-state wholesalers and retailers than entities outside their jurisdictions. See, *e.g.*, *Carter* v. *Virginia*, 321 U.S. 131, 135 (1944) ("The state of transit may compel the carrier to furnish information necessary for checking the shipment against unlawful diversion"). In upholding Missouri's wholesaler residency requirements, the Eighth Circuit explained "that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts." *S. Wine & Spirits of Am., Inc.* v. *Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013).

Retail, in particular, is the most inherently local tier of the three-tier system. The Tennessee law at issue here governs brick-and-mortar liquor and package stores that are the final connection between the State's alcohol distribution system and the general public. See Pet. App. 50a (Sutton, J., concurring in part and dissenting in part) ("Because they form the final link in the distribution chain, retailers are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" (quoting *S. Wine & Spirits*, 731 F.3d at 810)).

Even within the same statutory section of the law challenged here, Tennessee specifies various other qualifications for the owners of liquor retail stores—and each one of these regulations is more easily enforced by requiring retailers to have sufficient connections to the State. See Tenn. Code § 57-3-204(b)(2)(A)-(L). For example, among other disqualifying factors, the license holder cannot have any felony convictions, hold any other alcohol distribution or food retail licenses, or hold any

elected office. *Ibid.* And the Tennessee Alcoholic Beverage Commission "is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed." *Id.* § 57-3-204(b)(4). These various regulations control everything from a liquor store's physical premises to its hours of operation. See *id.* § 57-3-204. Like residency requirements, physical-presence requirements allow States to effectively enforce laws designed for orderly market conditions and public safety.

Given the localized nature of many alcohol regulations, a State would have limited avenues to enforce compliance without residency or physical-presence requirements ensuring a retailer has sufficient connections to the State. For example, States may validly require training in responsible alcohol sales and mandate that retail store managers obtain a "Manager's Permit" by completing annual training. *Id.* § 57-3-221. Similarly, the Tennessee Alcoholic Beverage Commission conducts routine compliance checks of brick-and-mortar retails stores. These inspections ensure that each retail location follows the statutory and regulatory guidelines—such as the requirement that each retailer post "in the most conspicuous place on the premises" its license and keep a "copy of the rules and regulations promulgated by the commission" on hand. *Id.* § 57-3-211. And each applicant for a retail license must "submit with the application to the commission a certificate signed by the county mayor" affirming that the applicant meets the license qualifications and that the proposed location complies with local ordinances. *Id.* § 57-3-208. Tennessee is far from alone in its comprehensive approach to regulating the retail sale of alcohol. Pet. Br. 33-36 (collecting state statutes). And enforcement of all alcohol regulations is

furthered by requiring retailers to have sufficient connections to the State.

Furthermore, residency requirements do much more than merely facilitate effective enforcement of retailers, as they also allow proper enforcement of the entire three-tier system. Without a residency requirement for retailers, the State would not be able to ensure that retailers are purchasing from in-state wholesalers, who in turn have purchased alcohol directly from producers (whether in-state or out-of-state). Each step in this chain is designed to "funnel" alcohol sales through the appropriate channels and, in turn, through various levels of state regulation. See *Granholm*, 544 U.S. at 489 ("States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system."). Removing the retailer residency requirement thus limits the State's ability to enforce regulations pertaining to the entire distribution chain of the three-tier system.

Likewise, residency requirements encourage responsible ownership of alcohol distribution companies and public safety. Judge Sutton's dissent below observed that "Tennessee reasonably concluded that requiring retailers to reside in the communities that they serve would further 'health, safety and welfare.'" Pet. App. 50a (quoting Tenn. Code Ann. § 57-3-204(b)(4)). The Eighth Circuit credited a similar point behind Missouri's wholesaler residency requirements: "a wholesaler governed predominantly by Missouri residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce." *S. Wine & Spirits*, 731 F.3d at 811. The Eighth Circuit thus recognized that residents "are more likely to respond to

concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs." *Ibid.* These interests are only heightened with respect to retailers, who "sell alcohol directly to the public." *Id.* at 810.

Notably, local ownership and presence play a particularly important role in preventing underage sales of alcohol. As the Eighth Circuit and Judge Sutton noted, owners who reside in the community and operate these brick-and-mortar retail stores are in the best position to check identification, assess credibility, and manage employees' day-to-day compliance with applicable regulations. See Pet. App. 50a (Sutton, J., concurring in part and dissenting in part); *S. Wine & Spirits*, 731 F.3d at 811. Out-of-state owners and retailers do not have the same capability to oversee the business's direct interactions with the public, including minors. Residency requirements thus support a State's public-health interest in preventing underage sales of alcohol.

Part of the justification for the three-tier system also is the State's interest in preventing "unlawful diversion of liquor into its domestic market." *North Dakota*, 495 U.S. at 450 (Scalia, J., concurring in the judgment); see *id.* at 433 (plurality op.) ("The risk of diversion into the retail market and disruption of the liquor distribution system is thus both substantial and real."). This Court therefore found "[i]t is necessary for the State to record the volume of liquor shipped into the State and to identify those products which have not been distributed through the State's liquor distribution system." *Id.* at 433 (plurality op.). Today, citizens take for granted that illicit or tainted alcohol is generally not sold throughout the nation. But this is largely because of the responsible and traceable chain of custody provided by a three-tier system with effective in-state enforcement mechanisms. For example, if tainted alcohol is somehow introduced

into the three-tier distribution chain, this system can quickly fix the problem: Labeling and reporting requirements create a built-in tracking system for each shipment, and in-state residency requirements ensure a State can adequately enforce these laws. All of this is possible based on a well-documented chain of custody, knowing where the product is, and easily determining who is selling the alcohol.

In sum, a three-tier system allows regulators to effectively and flexibly adapt to the local norms and laws of their communities. Tennessee required in-state alcohol retailers not for economic discrimination in favor of local interests, but for the State's unquestioned interest in "the health, safety and welfare of this state." Tenn. Code § 57-3-204(b)(4); see *id.* ("[I]t is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises."). As Judge Sutton's dissent correctly summarized, "[r]equiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a; accord, *e.g.*, *Norris* v. *Grimsley*, 585 P.2d 925, 927 (Colo. App. 1978) ("[R]esidents of the affected neighborhood, by virtue of that fact alone, have a strong interest in insuring that the liquor licensing procedure is fairly and property administered.").

II. THE DORMANT COMMERCE CLAUSE APPLIES DIFFERENTLY IN THE UNIQUE CONTEXT OF STATE ALCOHOL REGULATIONS UNDER THE TWENTY-FIRST AMENDMENT.

Whatever the dormant Commerce Clause may require in other contexts, this Court has recognized repeatedly that state alcohol regulation presents unique concerns.

See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984) ("[t]his Court's decisions * * * have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause" (quoting *Craig* v. *Boren*, 429 U.S. 190, 206 (1976)); see also 42 U.S.C. § 290bb-25b ("It is the sense of Congress that . . . [a]lcohol is a unique product and should be regulated differently than other products by the States and Federal Government.").

This is primarily because the Twenty-first Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities*, 467 U.S. at 712 (citing *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964)). Consequently, "'[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Granholm*, 544 U.S. at 488 (quoting *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

State-specific regulations concerning alcohol distribution necessarily involve treating alcohol within the State's wholesale and retail tiers differently from alcohol outside that system. As Judge Sutton's dissent below rightly explained, "in-state distribution regulations in one sense always discriminate against out-of-state interests." Pet. App. 52a. But the Court has recognized that States can permissibly require such distribution through in-state wholesale and retail as part of their valid three-tier systems for alcohol regulation. See *Granholm*, 544 U.S. at 489 ("The Twenty-first Amendment * * * empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state

wholesaler" (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)).

So, while the Court has held that the dormant Commerce Clause applies in some fashion to alcohol laws, *ibid.*, "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 516 (1996). In particular, when a State has "attempted directly to regulate the sale or use of liquor within its borders—the core [Twenty-first Amendment,] § 2 power"—that law does not violate the dormant Commerce Clause. *Capital Cities*, 467 U.S. at 713.

More general pronouncements about the dormant Commerce Clause in other contexts do not control challenges to state alcohol regulation. For example, the Court has explained that the dormant Commerce Clause generally forbids a State from providing "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 99 (1994). But the "unquestionably legitimate" three-tier system requires in-state alcohol wholesalers and retailers, even if out-of-state entities would have wanted to distribute and sell alcohol in that State. *Granholm*, 544 U.S. at 489.

State alcohol regulation is therefore a unique context under this Court's precedents interpreting the Twenty-first Amendment in conjunction with the dormant Commerce Clause. See, *e.g.*, *Duckworth* v. *Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in the judgment) (recognizing that the "people of the United States," by enacting the Twenty-first Amendment, determined that alcohol regulation "should be governed by a specific and particular Constitutional provision").

The Court can therefore uphold the residency requirement here, as within the State's "core" Twenty-first Amendment power, without otherwise implicating the dormant Commerce Clause's operation outside the context of alcohol regulation. *Capital Cities*, 467 U.S. at 713. In fact, this Court has previously upheld state alcohol residency requirements. See *Heublein, Inc.* v. *S.C. Tax Comm'n*, 409 U.S. 275, 283 (1972) (state "resident representative" requirement did not violate the Commerce Clause because "[t]he requirement that, before engaging in the liquor business in South Carolina, a manufacturer do more than merely solicit sales there, is an appropriate element in the State's system of regulating the sale of liquor").

III. *GRANHOLM* V. *HEALD*'S HOLDING IS LIMITED TO PROTECTIONIST LAWS THAT DISCRIMINATE AGAINST OUT-OF-STATE PRODUCERS AND PRODUCTS.

A. *Granholm* clarified numerous times that its holding was limited to state laws discriminating against out-of-state alcohol *producers* and *products* (the first tier in a three-tier system). But the Court distinguished, as valid, laws requiring in-state alcohol wholesalers and retailers (the second and third tiers). *Granholm* thus held that both in-state and out-of-state alcohol producers must be required to use in-state wholesalers or retailers—or neither in-state nor out-of-state producers can be compelled to use a State's three-tier system.

Granholm invalidated state laws that allowed certain in-state wine producers to sell directly to consumers without allowing out-of-state producers to do the same. The Court concluded that these direct-shipment laws were discriminatory exceptions to the otherwise valid operation of a three-tier system requiring in-state alcohol wholesalers and retailers. In other words, the laws invalidated in *Granholm* allowed certain in-state

producers to bypass the traditional three-tier system of alcohol regulation (in-state wholesale and retail tiers), while out-of-state producers had to adhere to the three-tier system. See 544 U.S. at 466 ("the three-tier system is * * * mandated by Michigan and New York only for sales from out-of-state wineries"). As noted above, the Court expressly reasoned "that States could mandate a three-tier distribution scheme." *Ibid.* But *Granholm* held that a State could not subject only out-of-state produced alcohol to the three-tier system if in-state produced alcohol could evade this system. See *ibid.* (invalidating the "differential treatment between in-state and out-of-state wineries").

Commensurate with the fact that those state direct-shipment laws applied to producers, *Granholm* tailored its holding exclusively to producers. The majority opinion referred to "producer" or "product" almost 30 times (and to "winery" dozens more). Many of these references establish that the Court's holding was limited to the differential treatment of producers and products:

- "Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state *producers*." *Id.* at 476 (emphasis added).
- "The Court held that States were not free to pass laws burdening only out-of-state *products*." *Id.* at 477 (emphasis added).
- "Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own *producers*." *Id.* at 487 (emphasis added).
- "The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local *producers*." *Id.* at 489 (emphasis added).

- "State policies are protected under the Twenty-first Amendment when they treat liquor *produced* out of state the same as its domestic equivalent." *Ibid.* (emphasis added).
- "This [Twenty-first Amendment] power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state *producers*." *Id.* at 493 (emphasis added).

Not only did *Granholm*'s language emphasize "producer" and "product," its reasoning relied on the distinction between this first production tier versus the latter two tiers (wholesale and retail). Recognizing that States can "funnel sales through the three-tier system," the Court clarified that a State may "require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler." *Id.* at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)) (emphasis added). So States can require in-state alcohol wholesalers and retailers under *Granholm*, but they must "treat liquor *produced* out of state the same as its domestic equivalent" if States are going to implement a three-tier system. *Ibid.* (emphasis added).

Granholm's historical analysis also shows that its holding was limited to the differential treatment of producers—not wholesalers or retailers. The Court explained that ratification of the Twenty-first Amendment "constitutionaliz[ed] the Commerce Clause framework established under [the Wilson and Webb-Kenyon Acts]." *Id.* at 484 (quoting *Craig*, 429 U.S. at 205-206). *Granholm* then reasoned that these Acts had reaffirmed "the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor *produced* out of state." 544 U.S. at 483 (emphasis added). This line of cases, which *Granholm* held were

incorporated into the Twenty-first Amendment, implicated only producers—and not the remaining wholesaler and retailer tiers of the three-tier system:

- *Scott* v. *Donald*, 165 U.S. 58, 101 (1897) ("[W]hen a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; that such legislation is void as a hindrance to interstate commerce, and an unjust preference of the *products* of the enacting state as against similar *products* of the other states.") (emphases added).
- *Walling* v. *Michigan*, 116 U.S. 446, 455 (1886) (invalidating a "discriminating tax * * * operating to the disadvantage of the *products* of other states") (emphasis added).
- *Tiernan* v. *Rinker*, 102 U.S. 123, 127 (1880) ("A tax cannot be exacted for the sale of beer and wines when a foreign *manufacture*, if not exacted from their sale when of home *manufacture*.") (emphasis added).

This explains why *Granholm* invalidated state laws treating in-state and out-of-state alcohol producers differently, while reaffirming the unquestionable legitimacy of a three-tier system requiring in-state wholesalers and retailers.

B. While reaffirming the validity of three-tier systems, *Granholm* further limited the scope of its holding to state laws designed to discriminate in favor of local economic protectionism. See, *e.g.*, 544 U.S. at 472 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.").

Granholm relied on cases dealing with state laws that discriminated against out-of-of state producers, thereby protecting local producers from competition. See *id.* at

487-488. For example, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984), invalidated a state law that was admittedly designed with "simple economic protectionism" in mind. The law in *Bacchus* created an exception to the State's otherwise broadly applicable alcohol regulations by excepting certain local alcohol producers from excise taxes. See *ibid.* The holding in *Bacchus* turned on that law's economic protectionism in favor of local alcohol producers, as *Granholm* noted. See *Granholm*, 544 U.S. at 487 ("'The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.'") (quoting *Bacchus*, 468 U.S. at 276).

Similarly, *Granholm* relied on two additional cases involving economic protectionism where the practical effect of state laws would have been to regulate alcohol outside a State's boundaries. See *id.* at 488. *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Authority* invalidated a state law requiring out-of-state producers to affirm that their posted prices for alcohol sold to in-state wholesalers were no greater than prices charged to wholesalers in neighboring States. 476 U.S. 573, 575-576 (1986). Once the producer posted its monthly price in New York, it was required to seek approval from New York regulators before offering discounts in other States. *Ibid.* The Court held that this law violated the Commerce Clause because "the 'practical effect' of the law is to control liquor prices in other States." *Id.* at 583. And the Court rejected the State's reliance on the Twenty-first Amendment because "[t]he Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country or another State." *Id.* at 585 (citation omitted).

Soon thereafter, the Court also "rejected an identical argument" that Connecticut's analogous price-

affirmation statute was protected by the Twenty-first Amendment. *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 327 (1989). *Healy* relied on *Brown-Forman*'s holding that "the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other States." *Id.* at 342. Notably, however, *Healy* did not question Connecticut's three-tier system and the geographic restrictions requiring in-state wholesalers without questioning their legitimacy. *See id.* at 326 n.2.

In relying on these precedents, *Granholm* limited its scope to state laws designed for local economic protectionism—as opposed to laws implementing the well-established three-tier system for alcohol distribution. And none of these authorities implicate or tarnish the evenhanded three-tier system that *Granholm* emphatically reaffirmed.

IV. THE SIXTH CIRCUIT'S EXPANSION OF *GRANHOLM* TO IN-STATE RETAILERS WOULD EVISCERATE THE THREE-TIER SYSTEM THAT THIS COURT HAS ALREADY HELD "UNQUESTIONABLY LEGITIMATE."

As explained above, *Granholm* provided comfort that the three-tier system was still "unquestionably legitimate" by holding that "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. Under that express holding, a State's residency requirement for alcohol retailers should also be unquestionably legitimate, as that treats alcohol produced both in-state and out-of-state the same by requiring both to be sold by in-state retailers.

But if States cannot require alcohol wholesalers or retailers to have a sufficient connection to the State, then it is unclear how any meaningful version of state-based

alcohol regulation under a three-tier system can survive. See, *e.g.*, *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 190 (2d Cir. 2009) ("[B]ecause in-state retailers make up the third tier in New York's three-tier regulatory system, Appellants' challenge to the ABC Law's provisions requiring all wholesalers and retailers be present in and licensed by the state is a frontal attack on the constitutionality of the three-tier system itself." (citation omitted)); *Brooks* v. *Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) ("an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself").

If the Court were to expand *Granholm*'s holding beyond producers—by ruling that States cannot treat in-state and out-of-state wholesalers or retailers differently—this would call into question whether *North Dakota*'s reaffirmation of the three-tier system would have to be overruled. *North Dakota* upheld a State's labeling and reporting regulations for "liquor destined for federal enclaves" within the State. 495 U.S. at 430 (plurality op.). The Court concluded that "[t]he two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment" because the laws served a "valid state interest" as part of North Dakota's "comprehensive system for the distribution of liquor within its borders." *Id.* at 432. This "comprehensive system" for controlling alcohol distribution included in-state wholesalers and retailers. *Id.* at 447-448 (Scalia, J., concurring in the judgment).

There is thus no need to reconsider the three-tier system, particularly given that such systems for alcohol distribution have existed for decades. See Pet. Br. 33-34 (collecting state statutes); *North Dakota*, 495 U.S. at 432

(plurality op.). In surveying precedents, *North Dakota* noted that "[t]he Court has made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets." *Id.* at 431. And against the backdrop of this long history of State control over alcohol distribution, Congress has enacted various alcohol statutes throughout the years without enacting any comprehensive scheme for regulating local retailers. See, *e.g.*, 42 U.S.C. § 290bb-25b (the Sober Truth on Preventing Underage Drinking Act of 2006); 27 U.S.C. § 122a (the Twenty-first Amendment Enforcement Act of 2000); 27 U.S.C. § 201-212 (Federal Alcohol Administration Act of 1935); 27 U.S.C. § 122 (Webb-Kenyon Act of 1913, Pub. L. 62-398, 37 Stat. 699 (1913); re-enacted, 49 Stat. 877 (1935)); 27 U.S.C. § 121 (Wilson Act of 1890). Cf. *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173 (1939) (affirming Congress's ability to regulate liquor in certain circumstances, notwithstanding the Twenty-first Amendment).

Granholm did not mean to question a three-tier system requiring in-state alcohol retailers, as it expressly said this system was "unquestionably legitimate." 544 U.S. at 489. And this Court now should not expand *Granholm*'s holding beyond producers, as doing so would set this Court's precedents on a collision course by threatening the continued viability of *Granholm*'s and *North Dakota*'s unequivocal reaffirmation of the three-tier system.

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted.

SCOTT A. KELLER*
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-7700
scott.keller@bakerbotts.com

TRAVIS L. GRAY
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1234

Counsel for Amicus Curiae

*Admitted only in Texas. Not admitted in the District of Columbia. Practicing under the supervision of principals of the firm who are members of the District of Columbia bar.

November 2018

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION
Petitioner,

v.

ZACHARY W. BLAIR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

December 20, 2018

QUESTION PRESENTED

Whether Tennessee's durational residency requirements for retail liquor licenses are unconstitutional because they establish a regulatory regime that discriminates against interstate commerce and non-resident citizens.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE WERE INTENDED TO PROSCRIBE DIFFERENTIAL TREATMENT IN INTERSTATE COMMERCE 3

A. The Commerce and Privileges and Immunities Clauses Were Adopted to Prevent Economic Divisions Between States 3

B. The Commerce Clause and Privileges and Immunities Clause Have a "Mutually Reinforcing" Relationship 5

II. STATE REGULATION OF ALCOHOL IS LIMITED BY THE NON-DISCRIMINATION PRINCIPLE OF THE COMMERCE CLAUSE, WHICH TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS VIOLATE 7

A. The Court Has Already Held That The Twenty-First Amendment Does Not Insulate State Liquor Laws From Commerce Clause Scrutiny. 7

B. Tennessee's Licensing Statute Is Discriminatory on Its Face 10

C. Tennessee's Durational Residency Requirements Do Not Serve a Legitimate Local Purpose 12

III. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT STATES TO VIOLATE OTHER SUBSTANTIVE CONSTIUTIONAL PROVISIONS, INCLUDING THE PRIVILEGES AND IMMUNITIES CLAUSE 15

A. The Twenty-First Amendment Does Not Save State Laws That Violate Other Constitutional Provisions. 15

B. The Twenty-First Amendment Does Not Save Discriminatory Laws That Violate the Privileges and Immunities Clause. 17

C. Tennessee's Durational Residency Requirements Violate the Privileges and Immunities Clause 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 16

Austin v. New Hampshire,
420 U.S. 656 (1975) 4, 17

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 7, 11-12

Baldwin v. Mont. Fish and Game Comm'n,
436 U.S. 371 (1978) 6

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986) 7, 8, 10

Byrd v. Tenn. Wine & Spirits Retailers Ass'n,
883 F.3d 608 (6th Cir. 2018) 14

C & A Carbone, Inc. v. Clarkstown,
511 U.S. 383 (1994) 8

Cal. Retail Liquor Dealers Assn. v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 16

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 6

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 15-16

Chemical Waste Management, Inc. v. Hunt,
504 U.S. 334 (1992) 12

Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994).. 10-11

Corfield v. Coryell, 6 Fed. Cas. 546
(C.C.E.D. Penn. 1823) (No. 3,230) 6

Craig v. Boren, 429 U.S. 190 (1976) 16

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) ... 4, 12

Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) ... 16

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) ... 6

Granholm v. Heald, 544 U.S. 460 (2005) ... *passim*

Healy v. Beer Inst., 491 U.S. 324 (1989) ... 7, 9, 16-17

Hicklin v. Orbeck, 437 U.S. 518 (1978) ... 5, 19, 20

Hillside Dairy Inc. v. Lyons, 539 U.S. 59 (2003) ... 6

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) ... 7

Hughes v. Oklahoma, 441 U.S. 322 (1979) ... 3, 8

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) ... 16

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) ... 11

New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) ... 8, 12

North Dakota v. United States, 495 U.S. 423 (1986) ... 9, 10, 13

Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994) ... 8

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) ... 2, 6

Philadelphia v. New Jersey, 437 U.S. 617 (1978) ... 2, 10, 12

Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) ... 6, 18, 19

Toomer v. Witsell, 334 U.S. 385 (1948) ... 6, 18, 19, 20

United Bldg. & Constr. Trades Council of Camden County v. City of Camden, 465 U.S. 208 (1982) 6, 18, 19

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 6

Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) 6, 17-18

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 16

Zobel v. Williams, 457 U.S. 55 (1982) 6

Statutes

Tenn. Code Ann. § 204(b)(4) 13

Tenn. Code Ann. § 57-3-204(b)(4) 15

Tenn. Code Ann. § 57-3- 213(a) 11

Tenn. Code Ann. § 57-3-204(b)(2)(A) 11

Other Authorities

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) 4

Max Farrand, *Records of the Federal Convention of 1787* (2d ed. 1937) 4-5

The Federalist No. 7 (Hamilton) 4

The Federalist No. 22 (Hamilton) 9

The Federalist No. 42 (Madison) 5

The Federalist No. 80 (Hamilton) 5

Constitutional Provisions

U.S. Const. amend. XXI, sec. 2 16

U.S. Const. art. I, sec. 8, cl. 3 4

U.S. Const. art. IV, sec. 2, cl 1 5

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because durational residency requirements like those at issue here are contrary to the Founders' vision of promoting united commercial markets and avoiding economic discrimination between in-state and out-of-state residents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution guarantees citizens' right to engage in interstate commerce free from discriminatory and protectionist state regulations. This fundamental rule stems from the Framers' concern that, left unchecked, states would enact commercial regulations favoring their own residents at the expense of non-residents. Indeed, this Court has time and again struck down state laws that deprive citizens of their right to access the markets of other states on equal terms.

---

[1] Rule 37 statement: Petitioner and Respondents have filed blanket consents with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

In striking down discriminatory state commercial regulations, the Court has primarily relied on the dormant Commerce Clause. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978). As the Court reaffirmed in *Granholm v. Heald*, the Commerce Clause has always applied to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." 544 U.S. 460, 472 (2005). In line with this principle, the Court has also acknowledged the role of the Privileges and Immunities Clause of Article IV, § 2 in securing comity and preventing economic discrimination by ensuring non-resident citizens have "equality of privilege" with resident citizens. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).[2] Together, the Commerce and Privileges and Immunities Clauses ensure citizens of their right to access the markets of other states on equal terms. The statute at issue here, however, contradicts this central constitutional principle.

Tennessee's statute effectively imposes a *nine-year* residency requirement on retail liquor license applicants and, for corporations, a requirement that every officer, director, and stockholder satisfy the nine-year rule. The durational residency requirements flatly prevent non-residents and businesses from competing on the same terms as Tennessee residents.[3] The only

---

[2] The terms "citizen" and "resident" are synonymous for purposes of Article IV's Privileges and Immunities Clause. *Austin v. New Hampshire*, 420 U.S. 656, 663 n.8 (1975).

[3] Petitioner has argued that the Privileges and Immunities Clause does not apply to corporations and should not be held applicable to Tennessee's exercise of its police powers over liquor licenses. This argument is not persuasive. Respondent was named as a defendant in a declaratory judgment action and asserted the individual rights of its owners who were

plausible purpose of these onerous requirements is to exclude non-residents from Tennessee's market, thereby protecting in-state retailers from competition. While the Twenty-First Amendment affords states greater flexibility in devising alcohol regulations than regulations for other goods or services, it does not protect state laws that are mere economic protectionism. Tennessee's durational residency requirements are thus blatantly discriminatory and protectionist, in violation of both the Commerce and Privileges and Immunities Clauses.

ARGUMENT

I. THE COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE WERE INTENDED TO PROSCRIBE DIFFERENTIAL TREATMENT IN INTERSTATE COMMERCE

A. The Commerce and Privileges and Immunities Clauses Were Adopted to Prevent Economic Divisions Between States

The Framers adopted the Commerce and Privileges and Immunities Clauses with the express intent of avoiding the "tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979). Under the Articles, the practice of some states denying equal treatment to outlanders was

---

unconstitutionally deprived of the opportunity to obtain a liquor license solely because they were not Tennessee residents. Furthermore, this Court has never ruled that the Privileges and Immunities Clause does not apply to members of limited liability companies.

widespread. *See Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). Alexander Hamilton wrote that "regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens...naturally lead to outrages, and these to reprisals and wars." The Federalist No. 7 (Hamilton). Discriminatory state laws ultimately served as a catalyst for the Federal Convention of 1787. *See* Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 463–67 (1969) (describing how state economic regulations created a fundamental political crisis).

To cure the ills of the Articles of Confederation, the Framers adopted specific constitutional provisions designed to prevent differential treatment between state residents and non-residents. The Commerce Clause provides Congress with the power "to regulate Commerce with foreign Nations, and among the several States, and with the Native American Tribes." U.S. Const. art. I, sec. 8, cl. 3. The Framers believed a main function of the Commerce Clause was to restrain state power to impose discriminatory regulations on interstate commerce. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951) (averring the Commerce Clause was adopted to prohibit a "multiplication of preferential trade areas"). James Madison wrote that this central provision of the Constitution

> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a *negative and preventive provision* against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Max Farrand, *Records of the Federal Convention of 1787*, 478 (2d ed. 1937).

The same historical reasons underlying the Commerce Clause led to the adoption of the Privileges and Immunities Clause, which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, sec. 2, cl 1. For Madison, the purpose of the Clause is to ensure that "[t]hose who come under the denomination of free inhabitants of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of free citizens of the latter." The Federalist, No. 42 (Madison). Hamilton praised the Privileges and Immunities Clause as "the esteemed basis of the Union" because it secured "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled." The Federalist No. 80 (Hamilton).

Together, the Commerce and Privileges and Immunities Clauses illustrate the Framers' express intent of national uniformity in interstate commerce. These two central constitutional provisions, one a concurrent grant of power to the federal government and the other an express restraint on state power, work in tandem to proscribe economic discrimination between the states and promote national commercial harmony.

B. The Commerce Clause and Privileges and Immunities Clause Have a "Mutually Reinforcing" Relationship

In *Hicklin v. Orbeck*, the Court described the Privileges and Immunities Clause of Article IV and the Commerce Clause as having a "mutually reinforcing relationship." 437 U.S. 518, 531 (1978). This

relationship stems from their common origin and shared vision of federalism. *See Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 379–80 (1978); *see also Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 279–80 (1985).

Although the Commerce Clause and Privileges and Immunities Clause are found in different sections of the Constitution, their separation is one of form, not substance. Seeing as the former is an express *grant* of power to Congress and the latter is an express *limitation* on state power, the Framers separated them accordingly. *Baldwin*, 436 U.S. at 379–80; *cf. United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 220 (1982) (Rehnquist, C.J.) (distinguishing the Commerce Clause's "implied restraint" from the Privileges and Immunities Clause's "direct restraint").

Given the historical connection between the Commerce and Privileges and Immunities Clauses, it is unsurprising that courts have repeatedly found a reciprocal relationship between them. Moreover, the Court has recurrently invoked both clauses in cases implicating economically discriminatory state regulations. *See, e.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 570 n.4 (1997); *United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. 208; *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 68–69 (1824); *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Penn. 1823) (No. 3,230) (Washington, Circuit Justice);

As a result of their common origin in the Articles of Confederation and their shared purpose, the Commerce and Privileges and Immunities Clauses mutually reinforce the constitutional norm that the states are forbidden from discriminating against out-of-state residents in interstate commerce.

II. STATE REGULATION OF ALCOHOL IS LIMITED BY THE NON-DISCRIMINATION PRINCIPLE OF THE COMMERCE CLAUSE, WHICH TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS VIOLATE

A. The Court Has Already Held That The Twenty-First Amendment Does Not Insulate State Liquor Laws From Commerce Clause Scrutiny

In *Bacchus Imports, Ltd. v. Dias*, the Court firmly established that the Commerce Clause limits states' power under the Twenty-First Amendment. 468 U.S. 263 (1984); *see also Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986). The Court noted that "[i]t is by now clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." 468 U.S. at 275. "To draw a conclusion that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would...be an absurd oversimplification." *Id.* (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32 (1964)). A mere 13 years ago the Court again emphasized in *Granholm v. Heald* that states' regulation of alcohol under the Twenty-first Amendment "is limited by the nondiscrimination principle of the Commerce

Clause." 544 U.S. at 487. In reviewing the history preceding the Twenty-First Amendment and its prior decisions interpreting the amendment, the Court made it clear that it is not limited to alcohol "products" or "producers," and extends to out-of-state business interests. *Id.* at 486–89.

The Court has recognized on numerous occasions that the negative Commerce Clause proscribes "differential treatment of in-state and out-of-state economic interests that benefits the former and disadvantage the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994); *see also New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988) (applying the long-standing constitutional rule that "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" are prohibited under the "'negative' aspect of the Commerce Clause"). When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has struck down the statute without further inquiry. *See Brown-Forman Distillers Corp.*, 476 U.S. at 579. This mandate reflects the Framers' central concern in avoiding the tendencies toward economic Balkanization that had plagued relations among the states under the Articles of Confederation. *Hughes*, 441 U. S. at 325–26. The rule of non-discrimination in interstate commerce ensures rivalries among the states are thus kept to a minimum, and a proliferation of trade zones is prevented. *See C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994) (citing The Federalist No. 22, (Hamilton)).

The implicit limitations on states' power imposed by the Commerce Clause in no way proscribes states

from enacting broad, universally applicable regulations. *See Granholm*, 544 U.S. at 493. To be sure, state policies are generally protected by the Twenty-First Amendment when they are non-discriminatory and evenhanded. *Id.*. Even a state that chooses to ban the sale and consumption of alcohol altogether could bar its importation entirely without running afoul of the Commerce Clause—and, as history shows, it would have to do so to make its laws effective. *Id.* at 488–89. It is also firmly established that states may assume control of liquor distribution through state-run outlets or funnel sales through the three-tier system, which the Court has recognized as "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1986). Although states enjoy broad powers under the Twenty-First Amendment, they are not without limits. When a state exercises regulatory power over the sale of alcohol in a way that discriminates against out-of-staters, "[t]he discriminatory character [of the challenged statute] eliminates the immunity afforded [to the State] by the Twenty-first Amendment." *Healy*, 491 U.S. at 344 (Scalia, J., concurring).

The Court's recent application of the non-discrimination principle in *Granholm* to prohibit differential treatment of out-of-state businesses in the alcohol trade confirms that Commerce Clause principles apply beyond just liquor products, extending to the treatment of those involved in the liquor market as well. This follows because alcohol products cannot be separated from the people and businesses that produce and sell them. The present case involves straightforward attempts to discriminate in favor of local retailers. Such blatant protectionism is contrary to the non-discrimination principles recognized by this Court's

Commerce Clause jurisprudence. Thus, the Twenty-First Amendment cannot save Tennessee's statute.

B. Tennessee's Licensing Statute Is Discriminatory on Its Face

In deciding whether a state regulation violates the dormant Commerce Clause, the Court determines whether the law facially discriminates against out-of-state actors or has the effect of favoring in-state economic interests over out-of-state interests. *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Discriminatory laws are subject to a "per se rule of invalidity." *Philadelphia*, 437 U.S. at 624. This presumption can only be overcome by showing that the state has no other way to advance a legitimate local purpose, such as "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432.

The discriminatory nature of the Tennessee licensing statute is obvious. Under the statute, in order to obtain a retail liquor license, an individual must have "been a bona fide resident of Tennessee during the two-year period immediately preceding the date upon which application is made." Tenn. Code Ann. §57-3-204(b)(2)(A). The next clause provides that licenses, once granted, cannot be renewed unless the applicant has been a Tennessee resident "for at least ten (10) consecutive years." *Id.* Since liquor licenses in Tennessee are only valid for one year after issuance, Tenn. Code Ann. §57-3- 213(a), the renewal requirement effectively imposes a *nine-year* waiting period.

By essentially requiring out-of-staters to wait nine years to obtain a liquor license, the Tennessee statute establishes a barrier of entry to the state's retail liquor market. *See Cooper v. McBeath*, 11 F.3d 547, 553 (5th

Cir. 1994) (characterizing a similar residency requirement as an "impenetrable barrier to entering the Texas liquor industry"). In *Lewis v. BT Investment Managers, Inc*, the Court struck down a Florida statute because it "overtly prevent[ed] [out-of-state] enterprises from competing in local markets." 447 U.S. 27, 39 (1980). The Court explained that the statute posed an "explicit barrier" to "out-of-state firms with the kinds of resources and business interests that make them likely to attempt de novo entry." *Id.* If a statute absolutely prohibits entry into an industry by non-residents, then it necessarily discriminates against out-of-state economic interests. *See Granholm*, 544 U.S. at 473 (stating that laws violate Commerce Clause principles when "[t]hey deprive citizens of their right to have access to the markets of other States on equal terms"). Such a blanket prohibition is the most extreme form of economic protectionism. *See BT Investment Managers, Inc.*, 447 U.S. at 42.

Even Tennessee has expressly acknowledged the discriminatory nature of its durational residency requirements in recent attorney general opinions *E.g.*, BIO App. 8a, 11a-12a (concluding that the residency requirements "constitute trade restraints and barriers"). The district court below also determined that the requirements create a "barrier" for non-residents, who "will always be unable to obtain a retail liquor license." *Id.* at 74a. The court of appeals then correctly determined that Tennessee's durational residency requirements are "facially discriminatory." Pet. App. 31a.

As discussed above, the Twenty-First Amendment cannot save Tennessee's discriminatory statute since the "central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor

industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. The type of discriminatory durational residency requirements at issue in the present case contradict these principles. They deprive citizens of their right to have access to the markets of other states on equal terms. Allowing states to discriminate against out-of-state residents in liquor licensing invites preferential treatment for in-state retailers, an outcome destructive of the very purpose of the Commerce Clause. *See Dean Milk Co.*, 340 U. S. at 356. Accordingly, under the Court's Commerce Clause precedents, Tennessee's discriminatory residency requirements for liquor licenses are subject to "a virtually per se rule of invalidity." *Philadelphia*, 437 U.S. at 624.

C. Tennessee's Durational Residency Requirements Do Not Serve a Legitimate Local Purpose

Tennessee's durational residency requirements serve no other purpose than pure economic protectionism. The Court's Commerce Clause jurisprudence place a high burden on states to show discriminatory laws are justified by a legitimate state purpose. *See Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 344 (1992) (stating the "burden is on the State to show that 'the discrimination is demonstrably justified.'"). A discriminatory state regulation can only be upheld if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind.*, 486 U.S. at 278. The Court has "upheld state regulations that discriminate against interstate commerce *only after* finding, based on concrete record evidence, that a state's nondiscriminatory alternatives will prove unworkable." *Granholm*, 544 U.S. at 493. Moreover, in

deciding whether to invalidate state alcohol statutes, courts examine the "core concerns" of the Amendment. *See North Dakota*, 495 U.S. at 432 (identifying "the interest of promoting temperance, ensuring orderly market conditions, and raising revenue").

Tennessee has consistently pointed to its state interests asserted in the statement of legislative intent, namely protecting the "health, safety and welfare" of Tennessee citizens, and ensuring "oversight, control and accountability" for retail store owners and managers. *See* Tenn. Code Ann. § 204(b)(4). However, the Tennessee legislature did not add this statement until 2014 following a formal ruling by the state attorney general that the residency requirements were unconstitutional. Back in 2012, the state attorney general conceded that the legislative history of the statute in question pointed to protectionist motives and admitted that he could not "conceive" of a legitimate purpose for the requirements. BIO App. 8a, 11a. He further concluded that the state legislature did not "establish a local purpose sufficient to justify the discriminatory licensing provisions" and that the residency requirements "cannot be related to any kind of regulatory or public-safety concern" since they do nothing to address such concerns. *Id.* at 13a, 17a.

The district court below looked to the justifications that the Tennessee legislature added to section 57-3-204(b)(4) in 2014, two years after the Tennessee attorney general had formally ruled on the residency requirements. The district court stated that it "fail[ed] to see how the retailer residency requirements" advance Tennessee's purported interests. *Id.* at 80a. Based on the concrete record evidence, the district court below concluded that the state interests asserted in the

statement of legislative intent were insufficient to justify the statute's blatant discrimination. Pet. App. 31a-33a, 76a-80a.

The court of appeals majority reached the same conclusion. It correctly found that the Tennessee statute serves no legitimate local purpose that could not be readily served by other nondiscriminatory licensing requirements. *See* Pet. App. at 32a-33a (describing such alternatives). In *Granholm*, this Court similarly rejected the argument that a discriminatory state law was justified simply because the states "ha[d] greater regulatory control over in-state producers than over out-of-state wineries." 544 U.S. at 490. Moreover, lawmakers in Michigan and New York had alternative methods to pursue their legitimate goals. *Id.* at 490–91 ("[T]he States can take less restrictive steps to minimize the risk that minors will order wine by mail."). The Court further noted that "improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail." *Id.* at 492. These alternative means are equally applicable to Tennessee here.

Petitioner here has failed to meet its evidentiary burden to show that the discriminatory durational residency requirements protect "the health, safety, and welfare" of its citizens. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 625 (6th Cir. 2018); *see also* Tenn. Code Ann. § 57-3-204(b)(4)). The only conceivable purpose of the durational requirements is to exclude non-residents from Tennessee's market and protect in-state retailers from competition. None of the proffered justifications for the statute establish a

nexus between the exclusion of non-resident applicants and promoting a legitimate state interest. Nondiscriminatory alternatives could just as well achieve the purposes of citizen health and alcohol regulation. Thus, Tennessee's durational residency statute serves no legitimate local regulatory purpose and is unconstitutional.

III. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT STATES TO VIOLATE OTHER SUBSTANTIVE CONSTIUTIONAL PROVISIONS, INCLUDING THE PRIVILEGES AND IMMUNITIES CLAUSE

A. The Twenty-First Amendment Does Not Save State Laws That Violate Other Constitutional Provisions

The Twenty-First Amendment grants to the states special authority to regulate alcoholic beverages in ways that would otherwise be reserved to the federal government under the Commerce Clause. Section 2 expressly provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, sec. 2. But those words do not give states a blank check to regulate alcohol in violation of other parts of the Constitution.

Section 2 of the Twenty-First Amendment limits the effect of the dormant Commerce Clause on a state's regulatory authority over the *delivery or use* of alcoholic beverages within its borders, but "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712

(1984); *Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful."); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U. S. 484, 515 (1996) ("while [the Twenty-first Amendment] grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions.").

The Court has already acknowledged several areas in which the Twenty-First Amendment is subject to other constitutional provisions, including the First Amendment, *44 Liquormart, Inc.*, 517 U.S. 484 (1996); Establishment Clause, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); Supremacy Clause, *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-114 (1980); Equal Protection Clause, *Craig*, 429 U.S. at 204–09; Due Process Clause, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and Import-Export Clause, *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

To understand what the Twenty-First Amendment does not allow, the Court can, as it has in the past, look to the broader constitutional framework and the substantive protections found therein. Tennessee could have, in line with its explicit authority under the Twenty-First Amendment, enacted a wholesale ban of all in-state liquor. Instead, the state chose to use a three-tiered distribution system and license its liquor retailers. In so doing, Tennessee subjected its regulatory scheme to scrutiny under other constitutional provisions, such as the Privileges and Immunities Clause. After all, the Twenty-First Amendment was not

designed to "save" state laws from constitutional scrutiny. *See Healy*, 491 U.S. at 344 (Scalia, J., concurring).

B. The Twenty-First Amendment Does Not Save Discriminatory Laws That Violate the Privileges and Immunities Clause

The Privileges and Immunities Clause of Art. IV, § 2, cl. 1, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause establishes a norm of comity that guarantees equality of treatment to non-resident citizens of one state coming within the jurisdiction of another. By making non-residence an improper basis for imposing a state regulatory burden, the Clause implicates both the individual right to non-discriminatory treatment and the structural balance between states that is essential to the concept of federalism. *Austin*, 420 U.S. at 662.

On numerous occasions the Court has struck down laws under the Privileges and Immunities Clause that were enacted for the protectionist purpose of discriminating against out-of-state residents. Several of these cases involved state laws precluding non-residents from obtaining licenses or practicing certain occupations. The Clause has an expansive reach in the realm of commercial regulations, especially when those regulations create discriminatory resident classifications.

The first such case was *Ward v. Maryland*, in which the Court struck down a statute under which non-residents were required to pay $300 per year for a license to trade in goods not manufactured in Maryland, while resident traders paid a fee varying from $12 to $150. 79 U.S. 418. Maryland attempted to justify the disparity as a "tax upon a particular business or trade,

carried on in a particular mode," rather than a discrimination against traders from other states. *Id.* at 422. The Court ultimately held that the discriminatory licensing fees violated the guarantee of the Privileges and Immunities Clause against "being subjected to any higher tax or excise than that exacted by law of...permanent residents." *Id.* at 430.

The Court has also invalided state laws that imposed discriminatory licensing requirements. In *Toomer v. Witsell*, for example, the Court struck down a state statute imposing a $2,500 license fee on out-of-state shrimping boats and only a $25 fee on in-state shrimping boats where purpose and effect of the statute was not to conserve shrimp, but to exclude non-residents and create a commercial monopoly for South Carolina residents. 334 U.S. at 385, 395, 397.

The Court has struck down multiple state statutes that precluded non-residents from obtaining a license to practice an occupation. In 1985, the Court struck down a residency requirement for admission to the state bar of New Hampshire. *See Piper*, 470 U.S. at 274. After discussing the prior case law, the Court found that "like the occupations considered in our earlier cases, the practice of law is important to the national economy." *Id.* at 281. Therefore, the right to obtain a law license was protected by the Privileges and Immunities Clause. *Id.*

Moreover, the Court has repeatedly invalidated laws that unduly obstruct freedom of enterprise. In *United Building & Constr. Trades Council of Camden Cty. v. Mayor and Council of Camden*, the Court invalidated a New Jersey municipal ordinance requiring that at least 40 percent of employees of contractors and subcontractors working on city construction projects

be city residents. 465 U.S. 249. The Court found that the regulation facially burdened out-of-state citizens' ability to pursue a common calling and was thus subject to Privileges and Immunities Clause review because of its unequal effect on out-of-state citizens. *Id.* Finally, in *Hicklin v. Orbeck*, the Court struck down a statute containing a resident-hiring preference for all employment related to the development of the state's oil and gas resources. 437 U.S. at 526–31.

The clear aim of the statutes at issue in each of these cases was to advantage in-state residents and commercial interests at the expense of their out-of-state counterparts. The Court appropriately recognized that these protectionist and discriminatory laws violated the Privileges and Immunities Clause. Similarly, Tennessee's durational residency requirements at issue here fit neatly within this Court's prior Privileges and Immunities Clause jurisprudence.

C. Tennessee's Durational Residency Requirements Violate the Privileges and Immunities Clause

As underscored in *Toomer*, the Privileges and Immunities Clause "guarantees to citizens of State A" the right "of doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396. Thus, a primary purpose of the Privileges and Immunities Clause is to "outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398; *see also Hicklin*, 437 U.S. at 526. Discriminatory classifications based on residence must have a substantial reason and bear a substantial relationship to the state's objective. *Piper*, 470 U.S. at 284. While

Petitioner and their amici offer several justifications for the discriminatory treatment of non-resident applicants for retail liquor licenses, none can satisfy this exacting standard of scrutiny required by the Privileges and Immunities Clause.

Tennessee's durational residency requirements essentially create two classes of persons: those who have been within the state for the prescribed period and those who have not. Requiring non-residents to wait *nine years* to obtain a liquor license creates a clear class distinction. The consequential effect of the requirements is to favor one class (in-state Tennessee residents) and disfavor another (non-residents) in the retail liquor trade.

Furthermore, Tennessee's durational residency requirements do not relate to the state's purported objectives of protecting the health, safety and welfare of its citizens. The requirements do not directly regulate the flow of alcoholic beverages within the state. Instead, they regulate the flow of *individuals* who can and cannot engage in economic activities. In the courts below, Petitioner provided no evidence that non-residents are the source of any "peculiar source of evil." *See Toomer*, 334 U.S. at 398; *see also Hicklin*, 437 U.S. at 526. Petitioner also failed to show a substantial reason for the discriminatory durational residency requirements. Instead, Petitioner relied on the self-serving justifications that the Tennessee legislature added to section 57-3-204(b)(4) in 2014. None of these can satisfy the exacting standard of scrutiny required by the Privileges and Immunities Clause.

Tennessee's discriminatory durational residency requirements deny non-residents the opportunity to apply for a retail liquor license on equal footing with

citizens of Tennessee. Accordingly, the requirements violate the Privileges and Immunities Clause.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed. If the Court vacates the decision below, it should remand for consideration of a Privileges and Immunities Clause challenge to Tennessee's discriminatory durational residency requirements.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

December 20, 2018

No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,
v.
ZACKARY W. BLAIR, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE CENTER FOR ALCOHOL POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

John C. Neiman, Jr.
Counsel of Record
Mary K. Mangan
MAYNARD COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, AL 35203
(205) 254-1228
jneiman@maynardcooper.com

November 20, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. *Toward Liquor Control*'s focus on connecting alcohol policy to local values is consistent with durational-residency requirements. 8

B. *Toward Liquor Control* advocated curbing consumption by limiting alcohol supply, not increasing it—and by keeping prices relatively high, not encouraging competition that would create the lowest possible prices 15

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

324 Liquor Corp. v. Duffy,
479 U.S. 335 (1987) 7

Arnold's Wines, Inc. v. Boyle,
515 F. Supp. 2d 401 (S.D.N.Y. 2007) 7

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (CA2 2009) 21

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 8

Manuel v. State, Office of Alcohol & Tobacco Control,
982 So. 2d 316 (La. Ct. App. 2008) 8

Maxwell's Pic-Pac, Inc. v. Dehner,
739 F.3d 936 (CA6 2014) 8

N.L.R.B. v. Noel Canning,
134 S. Ct. 2550 (2014) 4

S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control,
731 F.3d 799 (CA8 2013) 14, 15

Statutes

TENN. CODE ANN. §57-3-204(b)(4) 18

Constitutional Provisions

U.S. CONST. amend. XXI 6

Articles and Treatises

Daniels, Mark R.,
Toward Liquor Control: *A Retrospective,*
in SOCIAL & ECONOMIC CONTROL OF ALCOHOL
(Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008) 7, 13, 20

Diamond, Stephen,
The Repeal Program,
in SOCIAL & ECONOMIC CONTROL OF ALCOHOL
(Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008) 7

Erickson, Pamela S.,
The Dangers of Alcohol Deregulation: The United Kingdom Experience (2009) 16

FOCUS,
State-Level Alcohol Laws Face a Federal Challenge in the Supreme Court 21

FOSDICK, RAYMOND B. & SCOTT, ALBERT L.,
TOWARD LIQUOR CONTROL
(Center for Alcohol Policy 2011) (1933) ..... passim

Heckman, Dayton E.,
Contemporary State Statutes for Liquor Control,
28 AM. POL. SCI. REV. 628 (1934) 12

Jurkiewicz, Carole L. & Painter, Murphy J.,
Why We Control Alcohol the Way We Do,
in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL

(Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008) 7, 10

Lawson, Evan T.,
The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages,
in SOCIAL & ECONOMIC CONTROL OF ALCOHOL
(Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008) 7, 12, 13

Nat'l Comm'n on Law Observance & Enf't,
Report on the Enforcement of the Prohibition Laws of the United States
(1931) 10

Petro, Jim *et al.*,
Introduction to TOWARD LIQUOR CONTROL (Center for Alcohol Policy 2011) (1933) 7, 20

Rockefeller, John D. Jr.,
Foreword to TOWARD LIQUOR CONTROL
(Center for Alcohol Policy 2011) (1933) 5, 6

The Federalist No. 76
(J. Cooke ed. 1961) 4

Univ. of Sheffield, U.K.,
Independent Review of the Effects of Alcohol Pricing and Promotion 16

World Health Org.,
What are the most effective and cost-effective interventions in alcohol control?
(2004) 16

Legislative History

Roosevelt, Franklin D.,
Proclamation 2065—Repeal of the
Eighteenth Amendment (Dec. 5, 1933)..... 11

INTEREST OF *AMICUS CURIAE*[1]

The Center for Alcohol Policy is a nonprofit entity that educates policymakers, regulators, courts, and the public about alcohol regulation. By conducting research and highlighting initiatives that maintain the appropriate state-based regulation of alcohol, the Center promotes safe and responsible alcohol consumption. It fights underage drinking and drunk driving. And it informs key entities about the personal and societal effects of alcohol consumption. Through these endeavors the Center seeks to maintain civic awareness about why States regulate alcohol differently from every other commodity.

In 2011, the Center republished *Toward Liquor Control*, a book John D. Rockefeller, Jr. commissioned during the Twenty-first Amendment's ratification. This publication guided the States' liquor-control systems in the years that followed. Its observations provide critical insight about Americans' repeal-era views of the diverse array of measures the Constitution would allow States to take to prevent the problems that led to prohibition in the first place. This brief sets out observations from the book that are pertinent to the important constitutional question now before the Court.

---

[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Center for Alcohol Policy or its counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

SUMMARY OF ARGUMENT

A 1933 book commissioned by John D. Rockefeller, Jr., *Toward Liquor Control*, provides important evidence about what Americans of the time understood the Twenty-first Amendment to mean. This writing played an unusually influential role in shaping States' alcohol laws moving forward. Two of the book's central observations suggest that Americans of that time would have viewed durational-residency laws as among the many tools States have at their disposal in addressing the problems that led to both prohibition and repeal.

A. First, *Toward Liquor Control* described alcohol regulation as a fundamentally local problem requiring fundamentally local solutions. Prohibition had failed not because alcohol posed no problems worth addressing, but because the Eighteenth Amendment imposed a national policy without accounting for local values. A similar failure led to prohibition, for one of the chief problems of the pre-prohibition era was the non-resident, absentee owner of the "tied house" saloon, who had incentives to promote consumption without regard for the costs to the local community.

Toward Liquor Control recommended that States tailor their alcohol-control laws to account for these local values and to eliminate these problems. It recommended that States let local communities decide whether to go wet or dry, and suggested that States cater their licensing decisions to the needs and desires of local communities. Laws like those of Tennessee and other States—which require license holders to

have resided in the community long enough to understand those local values—comport with those observations and recommendations.

B. Second, *Toward Liquor Control* shows that policymakers in 1933 understood that the regulatory goal was not to allow as many licensees as possible to sell alcohol at the lowest possible price. The goal was the opposite. The authors criticized the profit motives of pre-prohibition tied-house saloon owners, who set prices so low and opened so many establishments as to encourage socially undesirable consumption levels. *Toward Liquor Control* therefore recommended that States reduce consumption by keeping prices higher and limiting the number of licensees. The objectives sought by some entities looking to challenge laws like Tennessee's—objectives that include opening big-box, national chain stores that sell alcohol to customers at cut rates—would create a market structure that policymakers in 1933 would have deemed unwise and at the very least not constitutionally compelled. States may, consistent with the democratic compromise that gave rise to the Twenty-first Amendment, limit licensees to a relatively small number of small-scale, locally owned businesses that commit to selling alcohol on the terms those States have dictated.

ARGUMENT

There is no Federalist Paper about the Twenty-first Amendment, but one document comes close. Writings from 1787 tell us much about what the Framers believed their proposed Constitution would do. *See, e.g.*, *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2558–59 (2014) (citing THE FEDERALIST No. 76, p. 510 (J. Cooke ed. 1961)). Writings from 1933 can tell us just as much about what latter-day Hamiltons and Madisons understood their alcohol-specific amendment had achieved. In this brief, the Center for Alcohol Policy describes what many historians regard as the single most influential contemporaneous writing addressing States' options to remedy a pressing social problem of their time. That book, *Toward Liquor Control*, is a 1933 publication by Raymond B. Fosdick, a lawyer, and Albert L. Scott, an engineer. *See* RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL (Center for Alcohol Policy 2011) (1933). Over about 100 pages, *Toward Liquor Control*—also known as the Rockefeller Report—made critical observations about why prohibition and repeal had occurred and what regulatory options would be appropriate for States moving forward.

The book's foreword underscores the complexity and magnitude of a problem that is difficult to conceive of in today's time—and emphasizes that broad-ranging control of liquor by States was a crucial component of the compromise that brought the Twenty-first Amendment about. In that foreword John D. Rockefeller, Jr.—businessman and philanthropist, and son of the Standard Oil founder—explained that he "was born a teetotaler" and had stayed that way all his life. John D. Rockefeller, Jr., *Foreword* to TOWARD

LIQUOR CONTROL, *supra*, at xiii. He thus held the "earnest conviction that total abstinence is the wisest, best, and safest position for both the individual and society." *Id.* But "the regrettable failure of the Eighteenth Amendment" had persuaded him that "the majority of the people of this country are not yet ready for total abstinence, at least when it is attempted through legal coercion." *Id.* He explained that "[i]n the attempt to bring about total abstinence through prohibition, an evil even greater than intemperance resulted—namely, a nation-wide disregard for law, with all the attendant abuses that followed in its train." *Id.* These rule-of-law concerns had moved Rockefeller from supporting prohibition to favoring "repeal of the Eighteenth Amendment." *Id.*

But "with repeal," Rockefeller explained, the problems the country faced were "far from solved." *Id.* If abstinence could not be achieved through the Eighteenth Amendment, the "next best thing" would be "temperance." *Id.* Without it, he emphasized, "the old evils against which prohibition was invoked" could "easily return." *Id.* The only way to achieve a stable equilibrium between those social ills and the lawlessness that prohibition had brought about would be what Fosdick and Scott called a "fresh trail," FOSDICK & SCOTT, *supra*, at 11, which Rockefeller described as "carefully laid plans of control" by the States, Rockefeller, *supra*, at xiii.

Those observations highlighted an important reality about the constitutional amendment the country then "anticipated." FOSDICK & SCOTT, *supra*, at xvii. The Twenty-first Amendment would not wave the white flag on the goals the Eighteenth Amendment

had sought to achieve. Prohibition had failed not because Americans did not see a problem with alcohol, but because efforts to ban liquor had caused "lawlessness." Rockefeller, *supra*, at xiv. The solution was not ending prohibition by itself. If it had been, then the Twenty-first Amendment would have stopped with its first section, which repealed "[t]he eighteenth article of amendment to the Constitution." U.S. CONST. amend. XXI, §1. The solution was instead to strike a balance between limiting alcohol's deleterious effects and acknowledging the limits of law enforcement. As Fosdick and Scott would put it, the Twenty-first Amendment reflected American sentiment "that there is some definite solution for the liquor problem—some method other than bone-dry prohibition—that will allow a sane and moderate use of alcohol to those who desire it, and at the same time minimize the evils of excess." FOSDICK & SCOTT, *supra*, at 10–11. So immediately after its first section repealing prohibition, the new amendment's second section took the extraordinary step of making it a *federal* constitutional violation for someone to violate *state* laws regarding "[t]he transportation or importation" of alcohol "into any State, Territory, or possession of the United States for delivery or use therein." U.S. CONST. amend. XXI, §2.

That language facilitated what Rockefeller argued was a crucial post-prohibition "objective": "focusing of all the forces of society upon the development of self-control and temperance as regards the use of alcoholic beverages." Rockefeller, *supra*, at xiv. Rockefeller therefore asked Fosdick and Scott to develop a "program of action" based on a "study of the practice and experience of other countries" as well as "experience in this country" regulating alcohol. *Id.*

That study played a significant role in shaping alcohol policy going forward. *Toward Liquor Control* was legislators' "only source of objective information" on these issues." Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL 7 (Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008). So "Fosdick and Scott's work was very influential." Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 33. The book "became the most important proposal for post-Repeal regulation" because it "articulated commonly accepted ideas and packaged them in a form that demanded respect in a post-Progressive world." Stephen Diamond, *The Repeal Program*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 100. "Many of Fosdick and Scott's recommendations for prohibition's repeal have been enacted by state and local governments." Mark R. Daniels, Toward Liquor Control*: A Retrospective*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 230. A group of former government officials and scholars have said that in "shap[ing] modern American alcohol policy," no non-religious text "has done more." Jim Petro *et al.*, *Introduction* to TOWARD LIQUOR CONTROL, *supra*, at vii. Courts thus have cited the book as an authoritative guide to, as Justice O'Connor once wrote, "[c]ontemporaneous[]" views of the Twenty-first Amendment's meaning. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 357 (1987) (O'Connor, J., dissenting).[2]

---

[2] *Accord Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 406 (S.D.N.Y. 2007); *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936,

As Petitioner has observed, the legislation States passed in prohibition's immediate aftermath stands as compelling evidence that durational-residency requirements were among the laws the Twenty-first Amendment immunized from dormant Commerce Clause scrutiny. *See* Pet. Br. 33–35. The observations and proposals in *Toward Liquor Control* help explain why those policymakers passed those laws. Fosdick and Scott described the problems that led to prohibition and repeal and explained what regulatory tools States would need. Their analysis fits hand-in-glove, in two critical ways, with laws that limit the persons eligible to sell alcohol to residents who are familiar with the rules and standards unique to the communities in which they operate.

A. *Toward Liquor Control*'s focus on connecting alcohol policy to local values is consistent with durational-residency requirements.

The most critical observation from *Toward Liquor Control* was that alcohol is a hyper-local problem requiring hyper-local solutions. To the extent dormant Commerce Clause doctrine balances "the Framers' distrust of economic Balkanization" against the Constitution's respect for "local autonomy," Fosdick and Scott saw the scales tipping—in the unique context of alcohol regulation—decidedly in favor of the latter. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

---

939 (CA6 2014); *Manuel v. State, Office of Alcohol & Tobacco Control*, 982 So. 2d 316, 323 (La. Ct. App. 2008).

To this end, Fosdick and Scott explained that the Eighteenth Amendment's "mistake" had not been the policy choice it embodied of banning alcohol *per se*—a measure they believed remained possible and appropriate in many locations—but in "regard[ing] the United States as a single community in which a uniform policy of liquor control could be enforced." FOSDICK & SCOTT, *supra*, at 6; *see also id.* at 14. "When the citizens of the United States" adopted the Eighteenth Amendment, "they forgot that this nation is not a social unit with uniform ideas and habits." *Id.* "They overlooked the fact that in a country as large as this, racially diversified, heterogeneous in most aspects of its life and comprising a patchwork of urban and rural areas, no common rule of conduct in regard to a powerful human appetite could possibly be enforced." *Id.* at 6–7. Even States were not "single communities," and "within the limits of a single city there would be subdivisions, the wishes and preferences of which would merit consideration." *Id.* at 8.

This divergence between the nationwide rule established by the Eighteenth Amendment and the specific values of particular communities had, in Fosdick and Scott's assessment, destroyed public respect for the rule of law during prohibition. Echoing Rockefeller's words, they opined that, in places where prohibition "did not represent public opinion," liquor statutes" had been "unenforced and largely unenforceable." *Id.* at 5.[3]

---

[3] As others documented during prohibition, the profits from illegal alcohol were "enormous" and were "the strength of gangs and corrupt political organizations in many places." Nat'l Comm'n on

Disparities between the national rule and local-government interests compounded the law-enforcement failures. Responsibility for enforcing the federal policy fell "almost entirely to the police officers and the inferior courts of the local units of government, in the hands of men who were responsible not to the federal government nor to the state government, but to the local voters." *Id.* at 7. This "centralizing of the determination of policy combined with the decentralizing of the execution of policy" had "nullified the experiment in those areas where sympathy for its purposes was nonexistent, and brought the inevitable trail of consequences in terms of the bootlegger, hypocrisy, corruption and failure." *Id.* Fosdick and Scott urged that "[t]he defiance of law that ha[d] grown up in the last fourteen years" due to failure to account for local community values—"the hypocrisy, the breakdown of governmental machinery, the demoralization in public and private life"—was "a stain on America that can no longer be tolerated." *Id.* at 9.

But it was not only prohibition's failure that highlighted the local nature of the problem. The excesses that had led to prohibition in the first place also had arisen from disconnects between the values of "the community" and those of market participants. *Id.* at 29. One of the chief "evils" of the pre-prohibition

---

Law Observance & Enf't, Report on the Enforcement of the Prohibition Laws of the United States 55 (1931), https://www.ncjrs.gov/pdffiles1/Digitization/44540NCJRS.pdf. An estimated 500,000 speakeasies operated from 1921 to 1930, and in 1930 alone, over 200,000 distilleries were seized. *See* Jurkiewicz & Painter, *supra*, at 5.

"days," Fosdick and Scott explained, was the institution known as "[t]he saloon," which had led to "poverty and drunkenness, big profits and political graft." *Id.* at 10. "Tied houses" were largely "responsible for the bad name of the saloon." *Id.* at 29. Tied houses were "under contract to sell exclusively the product of one manufacturer" and thus "under obligation to a particular distiller or brewer." *Id.* Adverse consequences had followed because, while the house was tied to the manufacturer, the manufacturer was not tied to local values. *Id.* "The manufacturer knew nothing and cared nothing about the community" in which its saloon operated. *Id.* "All he wanted was increased sales." *Id.* "He saw none of the abuses, and as a non-resident he was beyond local social influence." *Id.* This "system had all the vices of absentee ownership" and, Fosdick and Scott argued, "should be prevented by all available means." *Id.* "The saloon, as it existed in pre-prohibition days, was a menace to society and," even though prohibition itself was ending, "must never be allowed to return." *Id.* at 10.[4]

In addition to suggesting that States stem these "absentee" non-residents' influence by banning tied-house arrangements—something virtually all States

---

[4] The President emphasized this problem in his proclamation announcing the Twenty-first Amendment's ratification: "I ask especially that no State shall by law or otherwise authorize the return of the salon either in its old form or in some modern guise." Franklin D. Roosevelt, Proclamation 2065—Repeal of the Eighteenth Amendment (Dec. 5, 1933), https://www.presidency.ucsb.edu/documents/proclamation-2065-repeal-the-eighteenth-amendment.

eventually did in the wake of the Twenty-first Amendment[5]—Fosdick and Scott recommended that States take additional measures to ensure that alcohol laws reflect "[w]hat . . . the Community want[s]." *Id.* at 8. As a general matter, they suggested that States follow "the principle of 'local option,'" which placed "the determination of how the liquor problem shall be handled as close as possible to the individual and his home." *Id.* at 8. Voters in "individual cities and counties" could decide "whether their communities should be 'wet' or 'dry,'" and—if "wet"—what kinds of alcohol were legal and what venues could sell it. *Id.* at 35–36. Doing so would "place[] behind all the local officials who administer the system the same public opinion that determines the system." *Id.* at 8.[6]

---

[5] States that "selected licensing along the model of Fosdick and Scotts' 'three-tiered system,' interpos[ed] a wholesaler level between the supplier and retailer, as the best method of correcting past abuses, establishing an orderly system of distribution and control of alcoholic beverages and preventing the evil of the 'tied house.'" Lawson, *supra*, at 33. Today, most States continue to forbid vertical integration among alcohol businesses. *Id.* at 31.

[6] States generally followed this recommendation, such that even today, many cities and counties remain dry. Thus, one political scientist observed in 1934 that post-Twenty-first Amendment alcohol policy was a sharp departure from the trends towards centralization that marked the New Deal. As he put it, "one of the paradoxes of American politics" is "that we have destroyed the possibility of centralization in the field of liquor control at the same time that we have been attempting to achieve greater centralization in a number of activities hitherto believed to be completely in the field of state authority." Dayton E. Heckman, *Contemporary State Statutes for Liquor Control*, 28 AM. POL. SCI. REV. 628, 628 (1934).

Fosdick and Scott also emphasized the importance of local values and interests when prescribing ways for States to control alcohol after they had legalized it. They believed that the best system would funnel all sales of heavier alcohol through state-owned monopolies—such as the ABC Stores still prevalent in many States[7]—which would be well suited to "meet the local sentiment of small sections and communities." *Id.* at 54. Under that system, a state alcohol authority could "declin[e] to locate shops for the sale of liquor" in or near communities that did not want them, and could "close[]" a particular state-owned shop when local sentiment demanded as much. *Id.* at 55. Likewise, States opting for a regime under which the government granted private entities the privilege to sell liquor—the system Tennessee and many other States currently use[8]—could serve the same interests by "consulting neighborhood and community desires" before "grant[ing] or refus[ing]" a particular license. *Id.* at 30.

Toward Liquor Control did not specifically address residency requirements for these license holders, but these measures—prevalent at the time of repeal, and

---

[7] "As of 2000, eighteen 'control' states maintained some form of monopoly based on alcohol content and market segment . . . ." Lawson, *supra*, at 33. That said, "much variation exists among the monopolies." Daniels, *supra*, at 227. But "[n]o state has set up monopoly drinking establishments," and "[a]ll monopoly states also license the private sale of alcohol." *Id.*

[8] Most States now have chosen this option, under which they license a distribution system with three tiers. *See* Lawson, *supra*, at 33.

prevalent today—were a natural offshoot of Fosdick and Scott's observations and recommendations. They had attributed one of the pre-prohibition era's chief social ills to saloons' "absentee ownership" by "non-resident[s]" who "knew nothing and cared nothing about the community." *Id.* at 29. They had concluded that prohibition had failed because federal policymakers had not understood the "heterogeneous" values of individual communities within the country. *Id.* at 6. They believed that, above all else, the "defiance of law" present during prohibition needed to be eliminated. *Id.* at 9. And they advocated solutions under which the focus—either from state regulatory authorities or licensing boards—was always on "the local sentiment of small sections and communities." *Id.* at 54.

For States that opted to license private retailers rather than establish government-owned monopolies, it made sense—and continues to make sense—to limit licensees to persons and businesses who had been residents of the relevant community for enough time to prove their commitment to the values and laws governing them. Unlike tied-house owners from pre-prohibition days, those persons and businesses would, as the Eighth Circuit has put it, have reason to care about the "negative externalities" of "liquor distribution" state policymakers were concerned about. *S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (CA8 2013). Unlike the non-resident owners who had been "beyond local social influence," FOSDICK & SCOTT, *supra*, at 29, those persons and businesses would be "more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs." *S.*

Wine & Spirits of Am., 731 F.3d at 811. They would, as Judge Sutton suggested below, be more likely to be "knowledgeable about the community's needs and committed to its welfare" in a manner that *Toward Liquor Control* deemed to be critical to the path ahead. Pet.App.50a (Sutton, J., dissenting).

B. *Toward Liquor Control* advocated curbing consumption by limiting alcohol supply, not increasing it—and by keeping prices relatively high, not encouraging competition that would create the lowest possible prices

A second overarching observation from *Toward Liquor Control* offers pertinent insight about the end-goals Americans in 1933 had in mind for the Twenty-first Amendment and how they differ from those held by parties who would challenge state alcohol-control laws under the dormant Commerce Clause now. One of the Respondents here, Total Wine, is part of a national company that "operate[s] 193 superstores across 23 states and continue[s] to grow." *Our Company*, TOTAL WINE & MORE, https://www.totalwine.com/about-us/our-company (last visited Nov. 19, 2018). Total Wine explained in its brief in opposition that the Sixth Circuit's ruling allowed it to open the "largest retail establishment of its kind in" Tennessee, where it now offers alcohol "at competitive prices not previously seen in Tennessee." Br. Opp'n Tenn. Fine Wines & Spirits, LLC at 3 n.1. Fosdick and Scott did not understand the path to temperance to look at all like that.

Fosdick and Scott explained that in a system that attained true liquor "control" and thus the temperance the Twenty-first Amendment was designed to

achieve, "[t]he retail price level of alcohol beverages" would be key—in a way quite different from the one Total Wine's brief in opposition suggests. Alcohol pricing "not only determines profits, but also has a direct bearing," crucial for regulators who wished to achieve temperance, on "the amount of consumption." FOSDICK & SCOTT, *supra*, at 52. "[T]oo low a level of prices" could lead to unwanted "stimulation of consumption" that marked the pre-prohibition era. *Id.* at 53–54.[9] Yet producers would want "to set comparatively low prices to attract trade," and their profit motives would pose a substantial obstacle to temperance. *Id.* at 52.

---

[9] Contemporary evidence confirms that "[i]ncreases in price can have positive effects on all classes of drinkers in terms of health, crime and employment." Pamela S. Erickson, *The Dangers of Alcohol Deregulation: The United Kingdom Experience* 24 (2009), https://www.centerforalcoholpolicy.org/wp-content/uploads/2010/11/Dangers_of_Deregulation_UK_Experience.pdf (last visited Nov. 19, 2018). Price thus remains "a very critical factor in alcohol control." *Id.* Indeed, the World Health Organization concluded that "an increase in alcohol prices reduces consumption and the level of alcohol-related problems." *Id.* at 16 (quoting World Health Org., *What are the most effective and cost-effective interventions in alcohol control?* 4 (2004)). And researchers in a university in the United Kingdom concluded that alcohol "policies which result in price increases reduce alcohol-attributed hospital admissions and deaths, incidence of crime and reduced unemployment (defined as loss of job due to alcohol and absenteeism due to alcohol)." *Id.* (citing Univ. of Sheffield, U.K., *Independent Review of the Effects of Alcohol Pricing and Promotion*). In contrast, an alcohol-related "price war driving alcohol prices ever lower" in England is largely believed to "have been a major contributor to the alcohol epidemic" in that country. *Id.* at 2, 12.

Indeed, Fosdick and Scott attributed pre-prohibition excesses to absentee saloon owners' exclusive goal of "big profits." FOSDICK & SCOTT, *supra*, at 10. The "abuse of drink" had been "fostered by" pricing and sales practices geared toward this profit "drive." *Id.* at 26. "All" they "wanted was increased sales," which contributed to a "large excess of sales outlets" approximating the number of gas stations in some communities. *Id.* at 29. Thus, although "[s]tudents of liquor systems and proponents of plans have differed widely in their analyses and in their recommendations," there was "general agreement that the elimination of the profit motive, if it can be accomplished is, for America at least, the most promising road to successful control." *Id.* at 37.

These concerns contributed in no small part to Fosdick and Scott's conclusion that the best "means of control" would be a state-owned "liquor monopoly," which would control pricing and supply of "the heavier beverages for off-premises consumption." *Id.* at 41. The state government would "take[] over, as a public monopoly, the retail sale, through its own stores." *Id.* The advantage of that system was to eliminate "the profit motive." *Id.* at 37. The government could set prices high enough to keep the "amount of consumption" reasonable, but not so high they brought "on the problem of the bootlegger" selling at cut-rate prices on the black market. *Id.* at 52. The government would set a "profit policy" solely for "progressive liquor control," *id.* at 48, not maximizing the bottom line or "extend[ing] its sphere wherever business may be obtained," *id.* at 56. Avoiding the "overstimulated retail sale" the pre-prohibition market had produced, *id.* at 42, the state-run authority could price alcohol "in such

a way as to meet a minimum, unstimulated demand within conditions established solely in the interests of society," *id.* at 11.

If States opted to license private retailers instead, Fosdick and Scott recommended similar measures to keep prices relatively high and consumption relatively low. They advised that "[t]he license law should prohibit, as far as possible, all sales practices which encourage consumption," including "treating on the house" and "bargain days." *Id.* at 32. Laws forbidding tied-house arrangements would stem the intemperance problems that saloon-era "competition in the retail sale of alcoholic beverages" had caused. *Id.* at 29. Efforts could "be made under the licensing system to control prices" by establishing "minimum and maximum prices for the sale of liquor" and capturing "as excise all profits in excess of a specified rate or a percentage of all profits." *Id.* at 34. And States could temper consumption rates by "reduc[ing] the number of licenses from year to year" and limiting "[t]he number of licenses" on "a population basis." *Id.* at 30.[10]

None of that is to say *Toward Liquor Control* would have viewed Total Wine's different objectives—"commit[ing]," as it explains on its website, "to having the lowest prices" and using "tremendous buying power and special relationships with producers, importers and wholesalers [to] bring . . . considerable

---

[10] Indeed, "[r]egulators deplored what they considered to have been the profligate granting of licenses just after Repeal and the entrance into the business of those described as seeking quick money rather than a steady business." Diamond, *supra*, at 107.

savings" to customers—as an experiment the Constitution itself would affirmatively prohibit. *Our Company*, TOTAL WINE & MORE, https://www.totalwine.com/about-us/our-company (last visited Nov. 19, 2018). Fosdick and Scott recognized that the Twenty-first Amendment did not irrevocably tie States to particular alcohol policies. *See* FOSDICK & SCOTT, *supra*, at 98. So nothing in their analysis suggests that the Constitution would bar States from adopting systems, if they so chose, that allowed national-scale, big-box retailers to open franchises on every street corner offering massive volumes of liquor at cut-rate prices. But *Toward Liquor Control* suggests that Fosdick and Scott would have considered any such market structure unwise as a matter of policy, and at the very least their work shows that no regulator in 1933 would have imagined that the Constitution would affirmatively compel States to allow such a system.

The repeal-era vision of the right path forward involved higher prices rather than lower ones, and fewer licensees rather than more. Just as the Constitution allows the States to deviate from that original vision, it allows them to adhere to it, too. It is consistent with laws, like Tennessee's, that limit licensees to a relatively small number of small-scale, locally owned businesses that commit to selling alcohol on the terms their States have dictated.

* * *

If the magnitude and complexity of the problems Fosdick and Scott grappled with in 1933 are difficult to comprehend now, it is only because the experiment

in democracy and federalism the Twenty-first Amendment effectuated turned out to be remarkably "successful." Petro *et al.*, *supra*, at x. Today the tied house does "not exist," and "bootlegging and racketeering have been widely eliminated." Daniels, *supra*, at 230. But the success of the program does not mean it must now end, by rote application of this Court's dormant Commerce Clause precedents, under the premise that times have changed. It means the opposite.

To be sure, state laws controlling alcohol can and should change in certain ways—and in some cases, dramatically so. Fosdick and Scott were wise enough to recognize that "[n]o recommendations which we or anyone else could make carry with them an element of finality." FOSDICK & SCOTT, *supra*, at 97. "[N]ecessities and ideals cannot escape the processes of change," and Fosdick and Scott warned "against any system of control that has outlived its usefulness [or] that no longer represents the prevalent ideas and attitudes of the community." *Id.* at 98. "The opinion of this decade is not likely to be the opinion of the next; and in their attempt to find a method of regulation which meets the contemporary mood and attitude, lawmakers are often sorely perplexed." *Id.*

States thus are constantly updating their alcohol laws to comport with modern times and modern realities. "Many important regulatory functions were developed" after Fosdick and Scott's "book as state governments put the theories of *Toward Liquor Control* into practice." Petro *et al.*, *supra*, at ix–x. "State alcohol laws are among the most rapidly changing in the country," as "there have been at least 1,700 changes to state alcohol laws" in the last six years. FOCUS, *State-Level Alcohol Laws Face a Federal Challenge in*

the Supreme Court, http://www.leoninepublicaffairs.com/focus/state-level-alcohol-laws-face-federal-challenge-supreme-court/ (last visited Nov. 19, 2018). So as one of the more ardent defenders of the proposition that "the Constitution as a whole does and must evolve" has suggested, when it comes to alcohol regulation and the Twenty-first Amendment in particular, the task of updating the law is best left to the democratic processes rather than the courts. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 200 (CA2 2009) (Calabresi, J., concurring).

That is especially so because the Twenty-first Amendment was a remarkable democratic achievement in its own right. We live in times when Congress encounters great difficulty seeking even statutory solutions to pressing social problems, and when constitutional amendments are thought to be practical impossibilities. Yet even though alcohol was a pressing social problem in 1933 much like many others we face today, Americans of diverse viewpoints marshalled the democratic resources to address the problem on a constitutional level. And they did so in a way that reflected the most careful of compromises. Many, like Rockefeller initially, might have preferred prohibition to continue. Others might have preferred an open alcohol market without any state regulation. What three-fourths of Americans signed onto, and what all America got, was something in the middle. The Twenty-first Amendment's first section ended prohibition, but its second guaranteed that states would have considerable leeway to take steps—previously unavailable to them under the Court's dormant Commerce Clause precedents—to ensure that the end result of that experiment was temperance, not excess.

Fosdick and Scott's work shows that the mindset in 1933 was that States were free to use a wide array of laws and "many types of experiment" to achieve this end. FOSDICK & SCOTT, *supra*, at 97.

That democratic compromise is worthy of deference and respect, as are the numerous democratic compromises States have developed in their efforts to achieve and maintain temperance in the years since. States continue to take measures—whether they fit hand-in-glove with the ones Fosdick and Scott proposed, or whether they mark new innovations adapted to changed conditions—to maintain control over the market that in the years leading up to 1933 had caused manifest disregard for the rule of law and had threatened to tear the country apart. These laws remain a crucial component of alcohol control today, and it cannot be assumed that the 1933 project's successes will be preserved if they are struck down in the name of the dormant Commerce Clause. Laws like Tennessee's have been a part of the complex and diverse systems that kept those problems under control, and the Twenty-first Amendment ensures that the dormant Commerce Clause will not stand in their way.

CONCLUSION

This Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted,

John C. Neiman, Jr.
Counsel of Record
Mary K. Mangan
MAYNARD COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, AL 35203
(205) 254-1228
jneiman@maynardcooper.com

November 20, 2018

No. 18-96

In The
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS
RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, AFFLEURE INVESTMENTS, INC.,
AND TENNESSEE FINE WINES AND SPIRITS, LLC,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF *AMICUS CURIAE* CONSUMER ACTION IN SUPPORT OF PETITIONER

DAVID BALTO
Attorney at Law
1325 G Street, NW
Suite 500
Washington, DC 20005
202-577-5424
david.balto@dcantitrustlaw.com

Attorney for Amicus Curiae Consumer Action

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THREE-TIER DISTRIBUTION SYSTEM PROMOTES COMPETITION AND BENEFITS CONSUMERS	5
A. Background of Three-Tier Distribution System	5
B. Consumer Choice Explodes With Three-Tier Distribution System	8
C. The Sixth Circuit's Decision Undermines the Three-Tier Distribution System and Threatens To Reduce Competition and Consumer Choice	17
II. PRESERVING THE THREE-TIER DISTRIBUTION SYSTEM SERVES IMPORTANT POLICY GOALS INCLUDING STRONG CONSUMER PROTECTION ENFORCEMENT	20
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 20

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 20

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 6

Capital Cities Cable Inc. v. Crisp, 467 U.S. 691 (1984) 26

Granholm v. Heald, 544 U.S. 460 (2005) ..... *passim*

North Dakota v. United States, 495 U.S. 423 (1990) ..... *passim*

United States v. Frankfort Distilleries, 324 U.S. 293 (1945) 20

Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) 20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XXI ..... *passim*

U.S. CONST. amend. XXI, § 2 7

RULES AND REGULATIONS

Rule 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

AEI website, available at http://www.aei.org/publication/charts-of-the-day-welcome-to-the-golden-age-of-american-craft-beer/ 10, 11

Alcohol Policy Information System website, available at https://alcoholpolicy.niaaa.nih.gov/ 23

American Craft Beer website, available at https://www.americancraftbeer.com/the-golden-age-of-american-craft-beer/ 10

Andre Barlow, *One Drink Too Many: Why Consumers Will Lose from the Latest Beer Merger*, Law 360 (Nov. 12, 2015) 8

Andre Barlow, *Right Distribution Is Key to Successful Beer Remedies*, Law 360 (Jan. 27, 2016) 6

Andrew Adams, Costco Wine Buyer Talks Shelf Strategy, Wines & Vines, February 16, 2017, available at https://www.winesandvines.com/news/article/180732/Costco-Wine-Buyer-Talks-Shelf-Strategy 18

Anna King, *States Consider Banning Alcoholic Energy Drinks*, NPR (Nov. 9, 2010) 22

Barry Lynn, *Big Beer, A Moral Market, and Innovation*, Harv. Bus. Rev. (2012) 6

Bryan Pearson, *Walmart Inventory Cuts*, Forbes, November 9, 2015, available at https://www.forbes.com/sites/bryanpearson/2015/11/09/walmart-inventory-cuts-5-ways-to-make-room-for-the-best-shoppers/#51155b59378c 18

TABLE OF AUTHORITIES – Continued

Page

Carie Wade Gervin, *With wine in grocery stores and a new head of the ABC, Tennesseans are optimistic about the future of alcohol in the state*, Nashville Scene, June 30, 2016 16

Center for Alcohol Policy, National Survey Finds Americans Overwhelmingly Support the Current System of Alcohol Laws and Regulation (2015), available at http://www.centerforalcoholpolicy.org/2015/08/18/national-survey-finds-americans-very-satisfiedwith-current-alcohol-laws-and-regulations-3/ (last visited Sept. 16, 2016) 10

Chris Furnari, *Brewers Association: Craft Growth Slows to 5 Percent*, BREWBOUND (Aug. 1, 2017, 4:58 PM), available at https://www.brewbound.com/news/brewers-association-craft-growth-slows-5-percent 14

Cody Jennings, *Predictions for Wine Industry M&A in 2018 Success of the premium wine segment should drive much of the activity* WINES AND VINES, available at https://www.winesandvines.com/features/article/193821/Predictions-for-Wine-Industry-M-and-A-in-2018, January 2018 14

Danae King, *Laws including high-proof grain alcohol ban take effect Tuesday*, Baltimore Sun, June 30, 2014, available at https://www.baltimoresun.com/news/maryland/bs-md-grain-alcohol-illegal-tuesday-20140630-story.html 23

TABLE OF AUTHORITIES – Continued

Page

Ed Marcum, USA Today, *Tennessee grocery stores say wine sales a success*, March 17, 2017 16

Ensuring Competition Remains on Tap: The AB InBev/SABMiller Merger and the State of Competition in the Beer Industry: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 114th Cong. (2015). (statement of Craig Purer, National Beer Wholesalers Association), available at https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Purser%20Testimony.pdf 15

FTC Releases Fourth Major Study on Alcohol Advertising and Industry Efforts to Reduce Marketing to Underage Audiences, available at https://www.ftc.gov/news-events/press-releases/2014/03/ftc-releases-fourth-major-study-alcohol-advertising-industry.....19

Johns Hopkins Bloomberg School of Public Health Press Release, *Governor Signs Bill Banning Extreme-Strength Alcohol in Maryland*, May 5, 2014, available at https://www.newswise.com/articles/view/617429/?sc=dwhr&xy= 5047613 22

Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition, Department of Justice Press Release, July 20, 2016.....10

TABLE OF AUTHORITIES – Continued

Page

Kara Newman, *Craft Distilleries Growth Continues*, Wine Magazine, September 27, 2018.....14

Karen McVeigh, *Toxic and untaxed: perils of global trade in bootleg liquor exposed*, Guardian, June 11, 2018, available at https://www.theguardian.com/globaldevelopment/2018/jun/11/bootleg-liquor-africa-latin-america.....24

KPMG, *An Analysis of the Structure and Administration of State and Local Taxes on the Distribution and Sale of Beer*, NBWA (2009) and update in 2014, available at https://www.nbwa.org/resources/kpmg-tax-study-state-and-local-taxes-distribution-and-sale-beer-0 21

Lee Murphy, Walgreens Beverage Alcohol Powerhouse, Shaken News Daily, August 22, 2017, available at http://www.shankennewsdaily.com/index.php/2017/08/22/19048/walgreens-beverage-alcohol-powerhouse/.....18

Mack Burke, *Four states watching Oklahoma closely as lawmakers push liquor law overhaul*, Norman Transcript, October 9, 2015, available at https://www.normantranscript.com/news/four-states-watching-oklahoma-closely-as-lawmakers-push-liquor-law/article_d4058ece-6c48-11e5-abd7-67860a35ccb7.html 17

National Institute on Alcohol Abuse and Alcoholism, available at https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics 25

TABLE OF AUTHORITIES – Continued

Page

Neil Houghton and Marin Gjaja, *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group, June 19, 2014, available at https://www.bcg.com/publications/2014/consumer-products-for-small-large-brewers-us-market-open.aspx 14, 15

Number of Breweries, BREWERS ASSOCIATION.ORG, https://www.brewersassociation.org/statistics/number-of-breweries/ 14

Pamela S. Erikson, Safe and Sound (Campaign for a Healthy Alcohol Marketplace), available at http://www.nabca.org/assets/Docs/Research/Studies/SafeandSound.pdf 8

Presidential Proclamation 2065 of December 5, 1933, available at https://catalog.archives.gov/id/299967/3/public?contributionType=tag 6, 7

Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 7

Robert M. Tobiassen, *The Fake Alcohol Situation in the United States*, Federal Regulatory and Compliance Consultant (2014), available at https://www.centerforalcoholpolicy.org/wp-content/uploads/2015/04/The_Fake_Alcohol_Situation_in_the_United-States_compressed.pdf 24

Size and Shape of the Global Illicit Alcohol Market, Euromonitor, November 6, 2018, available at https://www.securingindustry.com/food-and-beverage/a-quarter-of-alcohol-is-illicit-in-emerging-markets-report/s104/a8779/#.W-YHHpNKhaQ 23

TABLE OF AUTHORITIES – Continued

Page

The Alcohol Tobacco Trade and Tax Annual Report, Fiscal Year 2017, available at https://www.ttb.gov/foia/pdf/ttbar2017.pdf 9

INTEREST OF *AMICUS CURIAE*

Consumer Action has been a champion of underrepresented consumers nationwide for forty-seven years.[1] As a national non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low-and moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers to advance consumer rights and promote change. Consumer Action knows through its advocacy work that many consumers are subjected to unlawful, unfair, or deceptive business practices. Consumer Action was the leading voice to protect consumers through the passage of "lemon laws." Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices by providing consumer education materials in multiple languages, a free national hotline, a comprehensive website (www.consumer-action.org) and annual surveys of financial and consumer services. Over 7,000 community and grassroots organizations benefit annually from its extensive outreach programs, training materials and support.

The organization achieves its mission through several channels, from direct consumer education to

---

[1] Pursuant to Rule 37.6, Consumer Action states that all parties through their respective counsels filed blanket consents to anyone who wanted to file an *Amicus* brief. No party or party's counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submittal. No person other than *Amicus* or their members contributed money to fund its preparation or submittal.

issue-focused advocacy. As representatives of the public interest, Consumer Action submits this brief to provide its perspective on the potential impact of this Court's decision regarding Tennessee's durational residency requirements on the ability of states to regulate their alcohol markets, which will impact competition, consumers, as well as the welfare and safety of the public. All 50 states currently regulate the alcoholic beverage industry within their states. By constitutional design, each state was granted the authority to impose different laws and regulations on the industry so the laws and regulations regarding the distribution of alcohol are not uniform. That said, virtually all of the states operate a three-tier distribution system that is vital to promoting consumer protection and enhancing competition. Many states have durational residency requirements for new license applicants in the retail tier of the three-tier distribution system, which serves numerous public benefits such as keeping the public safe, encouraging responsible consumption, prohibiting underage and excessive drinking, and raising revenue. Millions of consumers drink beer, wine and spirits every day. Those consumers value the benefits of state regulation that ensures their safety and protects competition, resulting in increased innovation and greater variety of choice.

Importantly, the Sixth Circuit decision that durational residency requirements violate the dormant Commerce Clause undermines the three-tier distribution system, diminishes states' authority to regulate the distribution and sales of alcoholic beverages, and

threatens to reduce competition and consumer choice. The Sixth Circuit's decision affects the ability of states to make important decisions relating to the welfare and safety of their local consumers of alcohol and the economic structure of the alcoholic beverage industry within their own borders. The Sixth Circuit's decision will result in deregulation of the alcoholic beverage industry in individual states potentially allowing dominant corporations to exert greater influence over the retail sector throughout the United States. If the decision stands, it will disrupt the markets in which all of these small businesses (distributorships, retailers, craft brewers, wineries, and distilleries) operate. Any sudden judicial disruption of the status quo is of considerable concern to consumers. As a result, customers have a special interest that is not already directly represented by the parties to this litigation, and why we respectfully request this Court to consider this proposed *Amicus* brief and the implications for consumers.

SUMMARY OF ARGUMENT

Amicus curiae Consumer Action submits this brief in support of Petitioner. The Tennessee law and alcohol laws like it across the country help spur competition, protect consumer choice and foster consumer protection. Tennessee, like many states, has a "three-tier" distribution system for alcohol that separately regulates (1) producers of beer, wine and liquor, (2) wholesalers, and (3) retailers that sell directly to consumers. Under Tennessee law, there is a two-year

residency requirement for the initial license of a retailer that is now being scrutinized by this Court.

Amicus fully supports Petitioner's arguments on why Tennessee's two-year durational residency requirement for the initial license of a retailer is constitutional. *Amicus* writes separately to highlight how the Sixth Circuit's decision will harm small businesses and consumers. Tennessee's right to license and regulate local retailers is fundamental to its authority to establish and regulate a three-tier distribution system. Tennessee's residency requirement should be upheld for the following reasons. First, this Court should follow its own precedent and uphold the state's complete authority and right to regulate a three-tier distribution system within its borders because it undoubtedly has benefitted competition and consumers across the country. The Sixth Circuit's decision conflicts with this Court's reasoning in *Granholm v. Heald*, 544 U.S. 460 (2005), undermines the three-tier distribution system, harms competition and reduces consumer choice. The Sixth Circuit's decision will damage the businesses of small craft brewers, importers, wineries, and craft distillers, and ultimately result in less variety for consumers. Keeping the three-tier system in place is vital to promoting competition among distributors, retailers, brewers, wineries, and distillers and to continuing the explosive growth of new products that increases diversity of products for consumers. Second, preserving the three-tier system serves important policy goals related to protecting competition, promoting economic efficiency, strengthening consumer protection enforcement, and

protecting the welfare, health, and safety of the public. The Sixth Circuit's flawed decision threatens to disrupt the competitive landscape, damage the structure of the alcohol distribution markets, weaken states' consumer protection enforcement capabilities, and reduce consumer confidence as health and safety risks increase. Third, *Amicus* fully supports Petitioner's arguments and reasoning that Tennessee's two-year durational-residency requirement is constitutional and further states that it does not violate the dormant Commerce Clause because it does not treat out-of-state producers of alcoholic beverages differently than in-state producers and the law is a reasonable means of ensuring that the companies that obtain licenses to sell alcoholic beverages to consumers within its state and local areas know and are invested in the welfare of the local community they serve. *Granholm* expressly recognized the importance of the three-tier distribution system, which allows states to make decisions on who may sell alcohol to its in-state consumers.

ARGUMENT

I. THREE-TIER DISTRIBUTION SYSTEM PROMOTES COMPETITION AND BENEFITS CONSUMERS

A. Background of Three-Tier Distribution System

The U.S. alcoholic beverage industry is complex and highly regulated. Under the Twenty-first Amendment, the states have plenary authority to regulate the

sale and distribution of alcohol within their borders, including regulation of vertical relationships of alcohol companies through a three-tier distribution system of licensed and structurally separate producers, distributors, and retailers. *Granholm v. Heald*, 544 U.S. 460, 466, 473 (2005); *North Dakota v. United States*, 495 U.S. 423, 432 (1990); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The state laws, which allow for this regulation, came about after the repeal of Prohibition.[2] The Eighteenth Amendment to the Constitution, normally referred to as Prohibition, was in part a reaction to the system of "tied houses" that dominated the alcohol retail market.[3] Before Prohibition, producers of spirits and beer served small geographic areas and frequently either fully or partially owned the retail outlets. At the time, these brewers and distillers exerted exclusive control over retailers and used that control to pressure sales without concern for the safety or welfare of customers or the general public. The federal government was concerned with these "tied house" practices that resulted in producers of alcohol having control over retailers to favor their own brands and to engage in illicit behavior.[4]

---

[2] Andre Barlow, *Right Distribution Is Key to Successful Beer Remedies*, Law 360 (Jan. 27, 2016); Barry Lynn, *Big Beer, A Moral Market, and Innovation*, Harv. Bus. Rev. (2012).

[3] Barlow, *supra* note 2; Lynn, *supra* note 2.

[4] Presidential Proclamation 2065 of December 5, 1933, in which President Franklin D. Roosevelt announces the Repeal of Prohibition. (President Roosevelt's official proclamation to the nation strongly shows the federal government was giving states

When Prohibition was repealed through Section 1 of the Twenty-first Amendment, the 50 states were tasked with putting in place systems that would prevent a repeat of this harmful state of affairs. Section 2 of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. In other words, a state may prohibit the vertical integration of producers, wholesalers, and retailers to control the sale of alcohol within its borders. *See North Dakota* at 428, 432.

Each state took up this challenge to create its own regulatory framework, which resulted in 50 different state alcohol marketplaces rather than a nationally regulated one. The thought was that a vertically-integrated system has "all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local influence."[5] Many of the states created three-tier distribution systems where producers including brewers, wineries, and distillers sell to licensed wholesalers and distributors, which then market and sell the alcoholic beverages to

---

every tool to fight the return of the tied house). Available at https://catalog.archives.gov/id/299967?3/public?contributionType=tag.

[5] *See* Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* (republished by Center for Alcohol Policy 2011).

independent, licensed off-premise (i.e., grocery and convenience stores) and on-premise (i.e., restaurants and taverns) retailers, which market and sell to consumers.[6] The result is a three-tier system, which restricts licensed producers, distributors, and retailers to their respective service functions with the practical goal of ensuring that no producer or seller of alcohol could become powerful enough to force its products onto consumers in local communities. This Court has expressly recognized that "the three-tier system itself is 'unquestionably legitimate.'" *Granholm* at 466 (*quoting North Dakota* at 432).

B. Consumer Choice Explodes With Three-Tier Distribution System

As a result of the three-tier system, consumer choice has exploded. It was put in place to prevent producers of beer, wine, and spirits from having too much control over what consumers purchase. The divided structure "prevents marketplace domination by large companies that would seek to greatly increase alcohol sales through aggressive practices, or by controlling the entire alcohol distribution chain."[7] Alcohol regulation, unlike other industry regulations, actually increases diversity of product on retail store shelves and in restaurants, bars, and liquor stores. Independent

---

[6] Andre Barlow, *One Drink Too Many: Why Consumers Will Lose from the Latest Beer Merger*, Law 360 (Nov. 12, 2015).

[7] Pamela S. Erikson, Safe and Sound at 2 (Campaign for a Healthy Alcohol Marketplace), available at http://www.nabca.org/assets/Docs/Research/Studies/SafeandSound.pdf.

distributors and retailers sell beer, wine, and spirits driven by consumer demand when they are not beholden to powerful alcohol producers. As a result, retailers can sell an array of products and allow consumers to seek out whatever beer, wine, or spirit they most prefer.

By eliminating the manufacturer's ownership interest, distributors and retailers are free to take on additional brands, which has created a market for and spurred the growth of small craft brewers, wineries, and craft distillers. Indeed, the alcohol beverage market has consistently provided incredible variety and choice to legal drinking age consumers.

According to data from the U.S. Alcohol Tobacco Tax and Trade Bureau ("ATTB") Annual Report, the ATTB has approved over 1.1 million label applications for beer, wine and spirits brands over the past eight years. These new labels are in addition to the established and well-known alcohol beverage brands from years prior to 2010. These 1.1 million labels represent the opportunity that brewers, vintners, and distillers see in the existing regulatory environment of the current alcohol beverage marketplace.[8] Besides the evidence from the ATTB regarding the release of new beverages, consumers believe that an abundance of choices exist. To be sure, ninety-one percent of those surveyed in a bipartisan national survey agreed that it was easy for them to find a variety of alcoholic

---

[8] The Alcohol Tobacco Trade and Tax Annual Report, Fiscal Year 2017, available at https://www.ttb.gov/foia/pdf/ttbar2017.pdf.

beverages in their communities, and 84 percent agreed that there are more local and imported beers and liquors available than ever before.[9]

The flood of new varieties from craft brewers has occurred while two giants control over 70 percent of the beer production in the United States and in some areas of the country the combined shares are in excess of 90 percent.[10] This seeming paradox can be attributed to 50 different state regulatory regimes that oversee their markets. Craft brewers have met stiff competition and resistance from large established companies, yet they have been expanding. The vibrancy of the craft brew industry is directly related to the market structure that was created by the states and their decisions to keep wholesalers and retailers free from influence of powerful giants. Make no mistake, this "golden age of beer" is a result of state regulation.[11]

---

[9] Center for Alcohol Policy, National Survey Finds Americans Overwhelmingly Support the Current System of Alcohol Laws and Regulation (2015) ("National Survey"), available at http://www.centerforalcoholpolicy.org/2015/08/18/national-survey-finds-americans-very-satisfiedwith-current-alcohol-laws-and-regulations-3/ (last visited Sept. 16, 2016). The national survey of 1,005 adults over the age of 21 was conducted using an online methodology by a bipartisan team of pollsters, Whitman Insight Strategies and WPA Opinion Research, on behalf of the Center for Alcohol Policy from April 27–May 3, 2015. The margin of error is ± 3.1%.

[10] *Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition*, Department of Justice Press Release, July 20, 2016.

[11] *See* American Craft Beer website, available at https://www.americancraftbeer.com/the-golden-age-of-american-craft-beer/; AEI

The three-tier distribution system, in particular, has become the safety valve that keeps beer markets competitive as the United States Department of Justice's Antitrust Division ("DOJ") demonstrated in its challenge to Anheuser-Busch InBev's ("ABI") acquisition of SABMiller. In that action, the DOJ made clear that "[e]ffective distribution is important for a brewer to be competitive in the beer industry."[12] Because there are only two beer distributors of scale in most local markets, the DOJ alleged that the merger of the two largest global brewers "would increase ABI's incentive and ability to disadvantage its beer rivals by impeding the distribution of its beers."[13] The concern was that ABI could use its market power at the supplier level to exert a tremendous amount of influence over what beer wholesalers/distributors carry and what retailers would sell. The DOJ found in its investigation that new entry from craft brewers, which worked with independent distributors and retailers, led to an increase in innovation and consumer choice as new beers with a wide range of unique styles and tastes were being introduced to consumers every day.

The DOJ, however, recognized that small breweries cannot grow in scale and effectively compete without access to efficient beer distribution networks.

---

website, available at http://www.aei.org/publication/charts-of-the-day-welcome-to-the-golden-age-of-american-craft-beer/.

[12] *United States v. Anheuser-Busch InBev and SABMiller, plc*, Competitive Impact Statement 8 (July 20, 2016).

[13] *United States v. Anheuser-Busch InBev and SABMiller, plc*, Compl. ¶ 7, 45–47 (July 20, 2016).

Accordingly, the DOJ entered into a consent decree that requires ABI to engage in certain conduct going forward that will promote distributor freedom, cap its ability to grow its own distribution business, and submit to oversight for the next eight years, all in an effort to protect the growth of the craft brew industry in furtherance of state regulatory goals.[14]

The federal government's consent order regulating ABI's day-to-day conduct is noteworthy for three reasons. First, it shows that the goals and purposes that motivated the creation of the three-tiered distribution networks are still relevant to the industry today. Second, the DOJ felt compelled to limit a large brewer's ability to increase its control over distribution to keep the beer market competitive. Third, the bottom line for the DOJ is that consumers are better off when they have more choices via independent distribution of scale.

Importantly, there is no one-size overarching alcohol policy for the United States. The last one-size-fits-all federal solution was the 18th Amendment which imposed National Prohibition. That one-size-fits-all approach was replaced with a 50-size approach combined with federal laws. This court in *Granholm* implicitly recognizes this by noting states can "funnel sales through the three-tier system." *Granholm*, 544 U.S. at 488–89. Each state determines whether and how to funnel sales through its distribution system.

---

[14] *United States v. Anheuser-Busch InBev and SABMiller, plc*, Final Judgment, Civil Action No. 1:16-cv-0148 (Oct. 22, 2018).

This "funnel" process of each state's three-tier system was recognized by the DOJ as important. Hence, its consent order requires that the distribution funnel remain open to the tremendous variety of breweries (domestic and import) seeking to sell to retailers in the United States. State laws such as physical presence or residency are all tools in the tool chest to help states make this system open.

Local producers (i.e., craft beer, local wineries, and craft distilleries), wholesalers and retailers are more amenable to state and local regulation and are more accountable to their local communities. By separating the tiers, states have allowed for competition to flourish, which has resulted in the availability of a diversity of products. As small brewers, wineries, and distillers bottle a wide variety of alcoholic beverages, consumers have a plethora of craft beer, wine, and spirit options from which to choose. This diversity has been enhanced as the states have reduced the economic incentives for wholesalers and retailers to favor the products of large corporate suppliers to the exclusion of small mom-and-pop producers.

Unquestionably, state alcohol regulation has promoted competition spurring the growth of small businesses. Indeed, today's craft beer, winery, and distillery renaissance in the United States was made possible by the complex regulations that exist in many of the 50 states. The craft beer, wine, and craft distillery industries have experienced tremendous growth under the current system. The craft brew industry grew by double digits from 2004 to 2015 and there are now

approximately 6,000+ craft breweries in the United States, more than at any other time in history.[15] Since 1995, the number of U.S. wineries has grown more than five-fold, from approximately 1,800 to 9,200.[16] And the craft distillery industry is also experiencing incredible growth as the number of active craft distillers grew from 200 local distilleries in 2005 to 1,835 as of August 2018.[17]

A Boston Group Consulting ("BGC") study demonstrates how the open independent distribution system helped entrepreneurial craft brewers increase market share over a 14-year period of time when overall beer sales remained flat.[18] The BGC study explains that small craft brewers were able to enter and grow

---

[15] *See* Chris Furnari, *Brewers Association: Craft Growth Slows to 5 Percent*, BREWBOUND (Aug. 1, 2017, 4:58 PM), available at https://www.brewbound.com/news/brewers-association-craft-growth-slows-5-percent; *Number of Breweries*, BREWERS ASSOCIATION.ORG, available at https://www.brewersassociation.org/statistics/number-of-breweries/.

[16] Cody Jennings, *Predictions for Wine Industry M&A in 2018 Success of the premium . ine segment should drive much of the activity* WINES AND VINES, available at https://www.winesandvines.com/features/article/193821/Predictions-for-Wine-Industry-M-and-A-in-2018, January 2018.

[17] Kara Newman, *Craft Distilleries Growth Continues*, Wine Magazine, September 27, 2018. The data comes from The Craft Spirits Data Project, a study led in conjunction with the ACSA, the *International Wine and Spirits Research* (IWSR) and advisory services consultancy *Park Street*. Lisa Rabasca Roepe, Sage, *Craft Distillers*, August 27, 2018.

[18] Neil Houghton and Marin Gjaja, *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group, June 19, 2014, available at https://www.bcg.com/publications/2014/consumer-products-for-small-large-brewers-us-market-open.aspx.

because the states required an open and independent distribution and how they would have had a difficult time affording all the warehouses and trucks needed to distribute beer over wide territories on their own. Without independent distributors, small brewers would mostly be limited to distributing in a very limited geographic area. Independent distributors make warehousing and trucking more efficient by aggregating all the various brands. The BGC study compared the brewing industry to direct store delivery ("DSD") categories and determined that state regulation made the brewing industry more competitive than the unregulated markets where large DSDs have a significant competitive advantage in DSD categories such as ice cream, soda, and snacks.[19] The BGC study notes that the three-tier distribution protections prevent the two powerful breweries from using their scale to extract advantages from the distribution system the way that powerful DSD suppliers dominate in other product categories.[20] By comparison, note how Coke and Pepsi dominate the soda aisles in many grocery stores, whereas beer offerings generally extend beyond just ABI and MillerCoors products.[21]

---

[19] *Id.*

[20] *Id.*

[21] *See Ensuring Competition Remains on Tap: The AB InBev/SABMiller Merger and the State of Competition in the Beer Industry: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (2015). (statement of Craig Purer, National Beer Wholesalers Association) available at https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Purser%20Testimony.pdf.

To be sure, nothing in the record indicates that Tennessee's alcoholic beverage industry, the wholesale tier, and the retail tier are not competitive or that consumers have been harmed by its durational residency requirements. On the contrary, the facts suggest that Tennessee has a strong alcohol beverage retail industry.[22] According to a press report in 2016, the number of new liquors-by-the-drink licenses has gone up every year since 2009.[23] In Tennessee, "[t]here are more distilleries every year, more local wineries, more breweries and more breweries making high-gravity beer. There are more wholesalers too, which means more products in more places."[24] In short, Tennessee's alcoholic beverage market appears to be competitive indeed. In summary, the alcoholic beverage industry is one of the most highly regulated industries in the United States, but the Tennessee and U.S. national alcoholic beverage markets are healthier than unregulated markets, which are characterized by large dominant players without any substantial growth of small businesses.

---

[22] Ed Marcum, USA Today, *Tennessee grocery stores say wine sales a success*, March 17, 2017; Carie Wade Gervin, *With wine in grocery stores and a new head of the ABC, Tennesseans are optimistic about the future of alcohol in the state*, Nashville Scene, June 30, 2016.

[23] Carie Gervin, *Tennesseans are optimistic about the future of alcohol in the state*.

[24] Carie Gervin, *Tennesseans are optimistic about the future of alcohol in the state*.

C. The Sixth Circuit's Decision Undermines the Three-Tier Distribution System and Threatens To Reduce Competition and Consumer Choice

The Sixth Circuit's decision conflicts with this Court's reasoning in *Granholm* and undermines the three-tier distribution system, which if it stands, will harm competition and reduce consumer choice. The Sixth Circuit's decision undercuts Tennessee's right under the Twenty-first Amendment to structure the alcoholic beverage distribution system within the state and, specifically, to create a three-tier distribution system that balances a number of public policy goals including the prevention of large firms from dominating local markets through vertical integration and promotion of competition. Its decision, if applied throughout the United States, would disrupt the markets in which beer brewers and importers, wineries, craft distillers, distributors and retailers currently operate, allowing dominant corporations to exert greater influence over the sale of alcoholic beverages to consumers. This will undoubtedly stifle competition and reduce consumer choice.

The sobering truth is that large big box retail chains, such as Costco, Total Wine, Walmart, national grocery stores, such as Safeway, and national retail pharmacies such as Walgreens, typically sell the most fast-moving products so they carry a limited number of SKUs (stock keeping units).[25] Although there are

---

[25] Mack Burke, *Four states watching Oklahoma closely as lawmakers push liquor law overhaul*, Norman Transcript, October 9,

now more than 9,000 wineries in the United States, the typical Costco location only carries 235 SKUs, which also includes beer and spirits in places where regulations allow all three to be sold in the same location.[26] Walgreens has a very targeted approach as it only stocks 150 SKUs for wine, 50 for spirits, and 35 for beer.[27] In other words, markets dominated by large corporations actually offer less choice not more. They make centralized purchasing decisions, a dynamic that makes it difficult for smaller alcoholic beverage producers to sell their products to large retail chains' customers. Moreover, large retailers have limited refrigerator and shelf space, so it is difficult for smaller producers to compete with larger producers and more recognized brands for the display of their products. In addition, dominant producers have increased their expenditures for point of sale marketing in retail establishments so that their brands will be promoted in the

---

2015, available at https://www.normantranscript.com/news/four-states-watching-oklahoma-closely-as-lawmakers-push-liquor-law/article_d4058ece-6c48-11e5-abd7-67860a35ccb7.html; Bryan Pearson, *Walmart Inventory Cuts*, Forbes, November 9, 2015, available at https://www.forbes.com/sites/bryanpearson/2015/11/09/walmart-inventory-cuts-5-ways-to-make-room-for-the-best-shoppers/#51155b59378c.

[26] Andrew Adams, Costco Wine Buyer Talks Shelf Strategy, Wines & Vines, February 16, 2017, available at https://www.winesandvines.com/news/article/180732/Costco-Wine-Buyer-Talks-Shelf-Strategy.

[27] Lee Murphy, Walgreens Beverage Alcohol Powerhouse, Shaken News Daily, August 22, 2017, available at http://www.shankennewsdaily.com/index.php/2017/08/22/19048/walgreens-beverage-alcohol-powerhouse/.

store.[28] Accordingly, smaller producers have difficulty getting large retailers to display their products and as the three-tier system is weakened so will the protections that have allowed small businesses to grow and consumers to choose from a variety of products.

In contrast, the result of the three-tier distribution system throughout the United States and in Tennessee, specifically, is that the alcoholic beverage industry is diverse, characterized by a wealth of consumer choice of products at various price points. Today, local small producers of alcohol currently have access to distributors, retailers, and consumers. The astonishing growth at the producer level suggests that competition has increased and that consumers have been the beneficiaries of that competition in the form of innovative products at relatively lower prices.

Moreover, the record is devoid of any facts to support any claim that there is some form of consumer harm present in Tennessee. The only claim from Respondents is that an out-of-state retailer may be excluded because the state requires that any retailer applying for a liquor license must be a resident of the state for a certain period of time. Again, the public policy goal behind the durational residency requirement is to make sure that all licensed retailers know and are vested in the local community that they serve. While

---

[28] FTC Releases Fourth Major Study on Alcohol Advertising and Industry Efforts to Reduce Marketing to Underage Audiences, available at https://www.ftc.gov/news-events/press-releases/2014/03/ftc-releases-fourth-major-study-alcohol-advertising-industry.

state licensing requirements and the antitrust laws have different goals, it is worth noting that the purpose of the antitrust laws is to protect competition not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (*citing Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Tennessee's interests in regulating what firms are selling alcohol directly to consumers within its state are much more important, let alone germane, than an out-of-state big box retailer, which is concerned about profits, having the ability to sell alcohol within the state. Without the three-tier system, Tennessee and U.S. consumers would likely lose out on the innovation, variety, and choice that exists today.

II. PRESERVING THE THREE-TIER DISTRIBUTION SYSTEM SERVES IMPORTANT POLICY GOALS INCLUDING STRONG CONSUMER PROTECTION ENFORCEMENT

Indisputably, the states were given the power to regulate the sale and distribution of alcohol within their borders. *North Dakota v. United States*, 495 U.S. 423, 432 (1986); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) (noting that the Twenty-first Amendment sanctions the state the right to prohibit the production, distribution, or sale of liquor); and *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945) (noting that the Twenty-first Amendment "bestowed upon the states broad regulatory power over the liquor traffic within their territories"). Each state adopted comprehensive rules and regulations that resulted in 50

different regulatory frar eworks and markets for alcoholic beverage companies. The goal of state alcohol regulation is to protect the welfare, health, peace, morals and safety of the public by "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. Alcohol regulation attempts to balance appropriate control over licensed producers, distributors and retailers with robust competition. The states and local governments make decisions that are based on their own community norms and standards. Thus, while states may have different views on how to regulate the production, transportation, distribution and sale of alcohol within their borders—Utah and California, for example, surely have distinct perspectives on how to organize this endeavor—each state should be allowed to make these decisions.

The three-tier system offers many economic benefits to society. First, it results in tax revenue to the federal, state, and local governments.[29] Second, it promotes small entrepreneurial businesses. For small producers (craft brewers, small wineries, and craft distilleries), they are given equal access to the marketplace that they would not receive without state regulation, which allows sales of their products to a wider range of consumers. They are allowed to compete

---

[29] KPMG, *An Analysis of the Structure and Administration of State and Local Taxes on the Distribution and Sale of Beer*, NBWA (2009) and update in 2014, available at https://www.nbwa.org/resources/kpmg-tax-study-state-and-local-taxes-distribution-and-sale-beer-0.

on a level playing field. Third, consumers have more choices to a variety of alcoholic products. Fourth, it is a win-win proposition that has resulted in procompetitive effects.

The three-tier system also attempts to minimize public health and safety risks. First, these laws and regulations provide safeguards for the safe handling of alcoholic beverages before they get to consumers. *North Dakota*, 495 U.S. at 432–33. This regulatory framework increases consumer confidence because only licensed distributors and retailers are able to provide and sell alcoholic beverages. It makes producers, wholesalers, and retailers accountable to local communities. Second, the system fosters controlled and accountable sales of alcohol. Third, the system also prevents the marketplace from being dominated by major companies that can use deceptive marketing tactics to increase alcohol sales causing customers to overdrink and overspend on alcohol, which creates numerous public health issues. Fourth, each state can do what it wants to set up a system to protect consumers. A state can test a product and/or decide not to allow the sale or listing of a product. For example, some states have prohibited the sale of grain alcohol or alcoholic energy drinks prior to any intervention by the federal government.[30]

---

[30] Anna King, *States Consider Banning Alcoholic Energy Drinks*, NPR (Nov. 9, 2010); Johns Hopkins Bloomberg School of Public Health Press Release, *Governor Signs Bill Banning Extreme-Strength Alcohol in Maryland*, May 5, 2014, available at https://www.newswise.com/articles/view/617429/?sc=dwhr&xy=

Moreover, consumer protection efforts are enhanced by the three-tier distribution system. Consumer Action is consistently on the front line in protecting consumers from deceptive and fraudulent conduct, so it believes that consumer protection efforts should be strengthened not weakened especially with regards to the alcoholic beverage industry. Because of significant federal and state regulation, the alcohol beverage industry in the United States is relatively safe. The three-tier system prohibits the sale of contaminated alcohol and ensures that producers, wholesalers, and retailers meet certain safety and quality standards. Unfortunately, that is not the case in most of the world. Euromonitor recently released a report entitled "Size and Shape of the Global Illicit Alcohol Market" indicating that 25 percent of the alcohol sold around the world is illicit.[31] Indeed, other countries do not have the same heightened scrutiny, controls, and regulations that the 50 states within the United States employ, so those countries face credibility issues and real health and safety risks especially in Africa and Latin America where it is estimated that up to half of all alcoholic

---

5047613; Danae King, *Laws including high-proof grain alcohol ban take effect Tuesday*, Baltimore Sun, June 30, 2014, available at https://www.baltimoresun.com/news/maryland/bs-md-grain-alcohol-illegal-tuesday-20140630-story.html; Alcohol Policy Information System website available at https://alcoholpolicy.niaaa.nih.gov/.

[31] *Size and Shape of the Global Illicit Alcohol Market*, Euromonitor, November 6, 2018, available at https://www.securingindustry.com/food-and-beverage/a-quarter-of-alcohol-is-illicit-in-emerging-markets-report/s104/a8779/#.W-YHHpNKhaQ.

drinks are illicit.[32] Furthermore, the Euromonitor Report concluded that there are five main factors driving the illicit trade in alcohol, including low awareness of the risks, low prices driving demand, inadequate regulation that can encourage the illicit market, a lack of enforcement, and poorly-regulated distribution channels. Fortunately, in the United States, there is strong state regulation of the wholesale and retail tiers and interlocking state laws that prevent monopolies in alcohol sales and minimize the risks of counterfeit, tainted, bootleg, or illegal alcohol being sold in our local communities.[33]

The Court's most recent opinion regarding the three-tier distribution system refused to retreat from this long history of state control: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run

---

[32] Karen McVeigh, *Toxic and untaxed: perils of global trade in bootleg liquor exposed*, Guardian, June 11, 2018, available at https://www.theguardian.com/globaldevelopment/2018/jun/11/bootleg-liquor-africa-latin-america.

[33] Robert M. Tobiassen, *The Fake Alcohol Situation in the United States*, Federal Regulatory and Compliance Consultant (2014), available at https://www.centerforalcoholpolicy.org/wp-content/uploads/2015/04/The_Fake_Alcohol_Situation_in_the_United-States_compressed.pdf.

outlets." *Granholm*, 544 U.S. at 488–89. If a state can decide to ban sales and assume direct control and operate its own state-run outlets, it surely has the authority to determine what firms will have the privilege of selling alcohol to its citizens. This Court further explained: "[T]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, at 484–85 (emphasis added).

While America's state-based, three-tier distribution system provides consumers with some accountability, certainty, and reliability regarding the sale of alcoholic beverages, the Sixth Circuit's decision invalidating Tennessee's durational residency requirement threatens the status quo. Special economic interests including large, big box retailers such as Respondent Total Wine, are seeking to deregulate alcohol through litigation. The result could be a reduction in a state's ability to control alcohol effectively. The rationale of the durational residency requirement for new license applicants is to make sure that new licensees know the local market, are accountable to the local community, and will encourage restrained and non-excessive alcohol consumption. Because of alcohol's well-known externalities, the state knows that the greatest output of alcohol is not the optimal goal of regulation.[34]

---

[34] National Institute on Alcohol Abuse and Alcoholism, available at https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics.

In summary, *Granholm* expressly recognized the importance of the three-tier distribution system, which allows states to prohibit and control the sale of alcohol, and license in-state retailers who will be selling alcohol to its in-state consumers. The three-tier system promotes competition and economic efficiency, while minimizing the health and social risks. Keeping the three-tier system in place is vital to keeping consumers safe. It serves as a framework for effective regulation, which has benefitted consumers, producers and society as a whole. Americans understand that alcohol is different from other commodities. The sale of alcohol must be regulated to reduce the chances of abusive excessive consumption, underaged drinking, and illicit alcohol sales, which can result in public health and social welfare problems. Large publicly held retailers selling alcohol have one goal: sell as much alcoholic beverages as possible to the consuming public to drive profits. Individual states are in the best position to tailor the regulations to local conditions and norms. A decision that further restricts the state's ability to regulate alcohol within its borders could potentially result in more harm than good as it would weaken consumer protection efforts. As noted by this Court, state alcohol laws are supported by "a strong presumption of validity and should not be set aside lightly." *North Dakota*, 495 U.S. at 433; *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (emphasis added).

CONCLUSION

Consumer Action urges the Court to be mindful of the effects its decision in this case will have on the ability of states to regulate and enforce their alcohol laws that are designed to promote competition, strengthen consumer protection enforcement, and protect the health and safety of consumers. Further, Consumer Action urges the Court to strongly consider the negative consequences an affirmance will have on the price, variety, quality, and choice of alcohol in Tennessee and throughout the country.

Respectfully submitted,

DAVID BALTO
Attorney at Law
1325 G Street, NW
Suite 500
Washington, DC 20005
202-577-5424
david.balto@dcantitrustlaw.com

Attorney for Amicus Curiae Consumer Action

No. 18-96

In the

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, *ET AL*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF 81 WINE CONSUMERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

James A. Tanford
Counsel of Record
Robert D. Epstein
Epstein Cohen Seif
& Porter LLP
50 S. Meridian St. #505
Indianapolis, IN 46204
(812) 332-4966
tanford@indiana.edu
Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTEREST OF *AMICI CURIAE* 1

II. SUMMARY OF ARGUMENT 4

III. ARGUMENT 7

A. State laws prohibiting buying wine from out-of-state retailers harm consumers 7

B. There is inconsistency in the lower courts about how the Commerce Clause should apply to wine retailer regulations 10

C. Discrimination favoring in-state over out-of-state wine retailers violates the Commerce Clause and is not saved by the Twenty-first Amendment 17

IV. CONCLUSION 25

APPENDIX A-1

A. Names of individual *amici* A-1

B. Other contributors to cost of brief A-3

TABLE OF AUTHORITIES

CASES

Arkansas Game & Fish Com'n v. U.S.,
568 U.S. 23 (2012) 22, 24

Arnold's Wines v. Boyle,
571 F.3d 185 (2d Cir. 2009) 13

Assoc. Indus. of Mo. v. Lohman,
511 U.S. 641 (1994) 20

Bacchus Imports Ltd. v. Dias,
468 U.S. 263 (1984) 11, 21

Best & Co. v. Maxwell,
311 U.S. 454 (1940) 20

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000) 8

Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth., 476 U.S.573 (1986) 10, 11, 18

Byrd v. Tenn. Wine & Spirits Retailers Assoc., 883 F.3d 608 (6th Cir. 2018) 15

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 25

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 14

Cooper v. Texas Alcoholic Beverage Com'n,
820 F.3d 730 (5th Cir. 2016) 12

Dept. of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 11

Direct Mktg. Ass'n v. Brohl,
135 S.Ct. 1124 (2015) 17, 18

Freeman v Corzine,
629 F.3d 146 (3d Cir. 2010) 9

Gibbons v. Ogden,
22 U.S. 1, 231 (1824) 20

Granholm v. Heald,
544 U.S. 460 (2005) . . . . . *passim*

Halliburton Oil Well Cementing Co. v. Reily,
373 U.S. 64 (1963) 20

Healy v. Beer Inst.,
491 U.S. 324 (1989) 11, 20, 21

H.P. Hood & Sons, Inc. v. DuMond,
336 U.S. 525 (1949) 3

Hostetter v. Idlewild Bon Voyage Liquor Corp.,
377 U.S. 324 (1964) 5, 11, 14

Lebamoff Enterpr., Inc. v. Rauner,
__ F.3d__, 2018 WL 6191351 (7th Cir. 2018). *passim*

Lebamoff Enterpr., Inc. v. Snyder,
__ F. Supp. 3d ___, 2018 WL 4679612
(E.D. Mich. 2018) 13, 16, 17

North Dakota v. U.S.,
495 U.S. 423 (1990) 22, 24

Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994) 11, 18

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 25

Sarasota Wine Mkt. v. Parsons,
4:17-cv-02792 (E.D. Mo.) 17

Siesta Village Mkt., LLC v. Granholm,
596 F. Supp.2d 1035 (E.D. Mich. 2008) 9

South Dakota v. Wayfair, Inc.,
138 S.Ct. 2080 (2018) 4, 17, 24

So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 14, 15

Wine Country Gift Baskets.com v. Steen,
612 F.3d 809 (5th Cir. 2010) 15

CONSTITUTIONAL and STATUTORY PROVISIONS

U.S. CONST., Amend. XXI... . . . . *passim*

U.S. CONST., art. I, § 8, cl. 3 . . . . . *passim*

Mich. Comp.L. §436.1537(1) (2004) 19

OTHER AUTHORITIES

Eric Asimov, *Wines are No Longer Free to Travel Across State Lines*, N.Y. Times
(Oct. 23, 2017) 1, 9

Dept. of Commerce, *U.S. Census Bureau News, Quarterly Retail E–Commerce Sales: 4th Quarter 2017* (CB18–21, Feb. 16, 2018) 18

Free the Grapes, *Issue Summary* ¶ 2 (2018)
https://freethegrapes.org/issue-summary/ 9

FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* (2003) 7, 10

K&L Wine Merchants, *Shipping*, https:// www. klwines.com/Shipping/StateLægality 2

H. Lee Murphy, *Interstate sales ban hurts local wine merchants*, Crain's Chicago Business (Nov. 10. 2017) 9

National Association of Wine Retailers, *Liquor Commission Banning New Hampshire Consumers from Buying More Than 200,000 Wines* (2018), https://nawr.org/press- releases/ 8, 10

National Association of Wine Retailers, *Michigan Wine Lovers Have No Access to 89% of Wines* (2017), https://nawr.org/commentary/ . . . 8

PricewaterhouseCoopers, *Understanding How U.S. Online Shoppers Are Reshaping the Retail Experience* 3 (Mar. 2012) 18

I. INTEREST OF *AMICI CURIAE* [1]

A woman in Troy, Michigan, asks her local wine shop if they have a 1998 Chateau Margaux to celebrate a twentieth anniversary, but is told they do not carry anything that old. A man in Moline, Illinois, who loves chardonnay, tries to order some highly rated Kistler Chardonnay directly from the winery, but is told it has all been allocated and he should try again next year. Members of a wine tasting club in Bloomington, Indiana, want to taste recent red wines from Argentina, but can find only four examples in town. The wines these consumers are searching for are readily available from out-of-state sources and sold over the internet, but each lives in one of the 36 states that imposes a residency requirement on wine retailer licenses that prevents consumers from buying from retailers in other states.[2]

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part or made a monetary contribution. Every individual who made a contribution toward the preparation and submission of the brief is listed in the Appendix. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* state that Petitioner and Respondents have all entered blanket consents on the docket to the filing of *amicus curiae* briefs.

[2] Fourteen states allow some kinds of internet sales. Eric Asimov, *Wines are No Longer Free to Travel Across State Lines*, N.Y. Times (Oct. 23, 2017) (https://www.nytimes.com/2017/10/23/dining/drinks/interstate-wine-sales

This *Amicus Curiae* Brief is written on behalf of 81 wine consumers like these.[3] They live in twenty-five different states. They share a common frustration that they cannot find the wines they want locally and are prevented from buying them from out-of-state sellers because of laws like Tennessee's residency rule that protect local retailers from out-of-state competition. The problem is especially serious in smaller cities and less populous states where local wine stores and grocery stores may stock only a few hundred out of the hundreds of thousands of wines carried by out-of-state retailers and sold online.[4]

The case before the Court does not directly concern the ability of consumers to buy wine from out-

---

-shipping-laws.html?_r=0). However, because of regulatory complexity, not all internet retailers will ship to all fourteen. E.g., K&L Wine Merchants, one of the biggest, will ship only to ten states. See https://www.klwines.com/Shipping/StateLegality. (all web sites last visited Nov. 29, 2018).

[3] The names of all amici are listed in the Appendix and include Eleanor and Ray Heald, lead plaintiffs in *Granholm v. Heald*, 544 U.S. 460 (2005). Another Amicus brief has been filed by an organization called Consumer Action that purports to represent the interests of consumers. It argues that consumers favor restrictive state laws that ban interstate competition, reduce supply and raise prices. Its claim cannot be taken seriously..

[4] A consumer can go to wine-searcher.com and quickly find internet retailers with a wine in stock, ready to ship.

of-state and internet retailers; it concerns Tennessee's residency requirement for operating a bricks-and-mortar wine store. However, the implications for internet sales are obvious and profound. If the Court were to rule, as the Petitioner has suggested, that the Twenty-first Amendment overrides the Commerce Clause and permits states to enforce protectionist and discriminatory residency rules when regulating bricks-and-mortar retailers, it would follow that states may also enforce discriminatory residency rules when regulating internet retailers. They could expand the right of their own retailers to sell wine via web sites and ship to consumers' homes, while prohibiting out-of-state retailers from doing so. Consumers would remain limited to the wine stocked by in-state sellers, no matter how limited or expensive their selection, and would be cut off from the more robust online wine market. The promise of the Commerce Clause that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any" would become a hollow one. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949).

Despite the fact that this case concerns retail sales of consumer goods, no consumers are parties to it. The parties are competing business interests fighting over the right to sell wine in Tennessee. But, how the Court resolves that dispute will obviously affect wine consumers, either limiting or expanding their access to the broad variety of wines sold by national chains, out-of-state sellers, and internet retailers. Eighty-one wine consumers have therefore submitted this brief to

urge the Court to affirm the Sixth Circuit's decision that Tennessee's residency rule, which prevents out-of-state entities from obtaining retail liquor licenses, is unconstitutional, and to declare unambiguously that the Twenty-first Amendment does not overrule the nondiscrimination principle of the Commerce Clause when state laws are regulating retail sales.

II. SUMMARY OF ARGUMENT

As this Court observed in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2095-97 (2018), the internet has transformed the national economy and redefined interstate commerce in ways that must be taken into account in implementing the Commerce Clause. A consumer's favorite store is now just as likely to be an online merchant located at the other end of the country as it is a bricks-and-mortar merchant located downtown. Most Americans shop online, which gives them access to a greater variety of goods than are available locally. The internet has fulfilled the Founders' vision of a national economic union.

Among the goods sold online is wine. There are hundreds of thousands of wines approved for sale in the U.S., but only a fraction is available in local grocery stores and wine shops. If a consumer wants a brand or type of wine not carried locally, the consumer can usually find it for sale from an out-of-state retailer over the internet. The only problem is that many states do not allow such transactions. They utilize various kinds of residency rules to deny licenses to out-of-state retailers and limit sales to merchants physically located in the state. This benefits in-state

businesses by protecting them from competition, but at the expense of consumers.

The case before the Court does not concern internet wine sales directly. It involves a different kind of residency rule that prevents out-of-state entities from obtaining retail licenses in Tennessee. However, the implication for consumer access to the internet marketplace is obvious. If the Court were to rule that the Twenty-first Amendment overrides the Commerce Clause and permits states to deny licenses to nonresidents for bricks-and-mortar retail stores, this precedent would also give states the authority to deny licenses to online retailers based on residency. In-state businesses could take internet orders and make home deliveries; those located out of state could not. This would cut off consumer access to the most important national marketplace and stand the Commerce Clause on its head.

Since 1964, this Court has consistently said that the Twenty-first Amendment does not override the Commerce Clause when alcoholic beverages are involved. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Most recently in *Granholm v. Heald*, 544 U.S. 460, 487-89 (2005), the Court said explicitly that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," and discriminatory laws are "not saved by the Twenty-first Amendment." A residency rule that benefits local interests and prevents competition from those outside the state is a classic type of discrimination forbidden by the Commerce Clause.

Despite this Court's consistent precedents, some lower courts have held to the contrary, that the nondiscrimination principle does not apply to residency rules for wine retailers. Their reasons have varied. Some read *Granholm* as saying that the nondiscrimination principle applies only to producers and not to retailers; others that the nondiscrimination principle does not apply to laws regulating the basic operation of the three-tier system. These strained interpretations of *Granholm* are based on *dicta* and phrases taken out of context, and should be rejected, as the Seventh Circuit did in *Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 (7th Cir. 2018). This Court's prior decisions and its discussion of the history and meaning of the Twenty-first Amendment lead to only one conclusion: Whatever power the Amendment gave states to impose even-handed burdens on interstate commerce in alcohol, it did not give them the authority to enact discriminatory laws. A state does not have to authorize the sale of wine by remote ordering and home delivery, but if it does -- and many states are beginning to -- it must allow out-of-state retailers to participate.

III. ARGUMENT

A. State laws prohibiting buying wine from out-of-state retailers harm consumers

In 2003, the FTC issued a report called *Possible Anticompetitive Barriers to E-Commerce: Wine.*[5] The FTC concluded that state laws prohibiting buying wine on the internet from out-of-state sellers harmed consumers by limiting choices, reducing supply and increasing prices. FTC Report at 3-4.[6] Even 15 years ago, the FTC took note that the internet was "transforming the nation's economy [and letting] consumers purchase an unprecedented array of goods and services from the convenience of their homes." *Id.* at 1. Instead of a few local wine stores with limited inventories, the internet gave consumers access to "thousands of goods" from online retailers. *Id.* The problem was that many states prohibited their citizens from buying wine over the internet and restricted them to whatever might be available locally.

That might not seem like a significant problem at first glance. There are thousands of retail wine outlets in every state, from big-box stores like Wal-Mart and

---

[5] https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf (last visited Nov. 29, 2018).

[6] The FTC report was cited heavily by this Court in *Granholm v. Heald*, 544 U.S. 460, 466, 467, 468, 490, 491, 492 (2005).

Costco, to grocery chains like Kroger and Safeway, to package stores, fine wine shops, drug stores, and convenience stores. But wine availability is not a question of quantity -- it is a matter of variety and selection. Some wines are available everywhere, like the Gallo brands Apothic and Barefoot that sell for under $10. Others, like a $350 Penfolds Grange, may be available only at two or three outlets in the entire country. Wines are not interchangeable. *See Bridenbaugh v. Freeman-Wilson* 227 F.3d 848, 849 (7th Cir. 2000) (inability to obtain a special wine is a palpable injury).

Local retailers carry only a small percentage of the wine that has been approved for sale by the Alcohol and Tobacco Tax and Trade Bureau (TTB). The National Association of Wine Retailers (NAWR) calculated that the TTB approved 405,513 wines from 2014-2017, but only 44,233 wines were on sale in Michigan and 7,438 in New Hampshire.[7] That means a majority of wines are not actually available to most consumers. There are several reasons for this.

a Some producers cannot find a wholesaler, especially those making small-production wines or trying to introduce new products. *See Granholm v. Heald*, 544 U.S. at 467-68.

---

[7] *See* NAWR, *Michigan Wine Lovers Have No Access to 89% of Wines* (2017) (https://nawr.org/commentary/); NAWR, *Liquor Commission Banning New Hampshire Consumers from Buying More Than 200,000 Wines* (2018) (https://nawr.org/press- releases/) (sites last visited Dec. 3, 2018).

b. Collectible, rare, and uncommon wines are sold primarily by a small number of specialty wine stores and auction houses in New York and other major cities.. *Freeman v Corzine*, 629 F.3d 146, 154 (3d Cir. 2010); H. Lee Murphy, *Interstate sales ban hurts local wine merchants*, Crain's Chicago Business (Nov. 10. 2017)[8]

c. A popular wine may sell out at local stores that do not carry deep inventories, especially if it gets a good review in a national wine magazine. *Siesta Village Mkt., LLC v. Granholm*, 596 F.Supp.2d 1035, 1037 (E.D. Mich. 2008).

d. Consumers may have difficulty getting to a store with a large wine inventory if they live in small towns or rural areas, Eric Asimov, *supra* n.2, or if they are elderly or disabled.

If a consumer cannot find a particular wine at a local retailer, sometimes the consumer can obtain it directly from the winery. Forty-five states now allow some form of direct shipping from wineries. Free the Grapes, *Issue Summary* ¶ 2 (2018).[9] However, this option is only available for domestic wine, and more than two-thirds of the wine approved for sale by the TTB is imported from other countries. Foreign wine cannot be ordered directly from the winery and is

---

[8] An online edition is at https://www.chicagobusiness.com/article/20171110/ISSUE01 (visited Dec. 3, 2018).

[9] https://freethegrapes.org/issue-summary/ (last visited Nov. 29, 2018).

available to consumers only from retailers. NAWR, *Liquor Commission Banning New Hampshire Consumers from Buying More Than 200,000 Wines, supra.*. Ordering directly from the winery is also feasible only if the winery has a retail operation (many do not), has not sold out, and has not already allocated the wine to other purchasers.[10]

Lack of local availability of wine is the inevitable by-product of a three-tier system in which only in-state entities may participate and interstate competition is prohibited. FTC Report at 3-4. If Tennessee will not issue retail licenses to out-of-state entities, then consumers are limited to whatever inventory their local retailers with limited shelf space decide to stock. Consumers end up cut off from 80% or more of the wines being sold elsewhere in the country. This is significant, because the "critical consideration" in Commerce Clause cases is "the overall effect of the statute on both local and interstate activity." *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S.573, 578-79 (1986).

B. There is inconsistency in the lower courts about how the Commerce Clause should apply to wine retailer regulations

This Court has long held that the Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, denies states the power to discriminate against out-of-state goods moving in interstate commerce. *Or. Waste Sys., Inc. v.*

---

[10] For an explanation of allocation, see http://www.kistlervineyards.com/ wines/how-to-acquire-kistler-wines/

Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994). This principle is driven by concerns about economic protectionism, i.e, regulations that restrict competition from out-of-state sellers and provide economic benefits to in-state businesses. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008). Such trade barriers are inherently destructive of national economic unity. Therefore, if a law discriminates against interstate commerce on its face, purposefully, or in practical effect, courts apply strict scrutiny and usually strike it down. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. at 578–79. A discriminatory law may only be saved if the state proves that the difference in treatment of in-state and out-of-state entities advances a legitimate local purpose that cannot adequately be served by less discriminatory alternatives. The standards for such justification are exacting and require concrete record evidence. *Granholm v. Heald*, 466 U.S. at 492-93

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, this Court said that "[t]o draw a conclusion ... that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd oversimplification, ... patently bizarre and ... demonstrably incorrect." 377 U.S. at 331-32. In *Bacchus Imports Ltd. v. Dias*, this Court held that the nondiscrimination principle applied to state liquor laws, prohibited economic protectionism, and was not overridden by the Twenty-first Amendment. 468 U.S. 263, 276 (1984). In *Healy v. Beer Inst.*, Justice Scalia wrote that a liquor law's discriminatory character

eliminates whatever immunity might otherwise be afforded by the Amendment. 491 U.S. 324, 344 (1989) (Scalia, J., concurring). In *Granholm v. Heald*, the Court built upon *Hostetter*, *Bacchus* and *Healy*, and held that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, and "not saved by the Twenty-first Amendment." *Id.* at 489. Despite this seemingly clear language, lower federal courts have been inconsistent when asked to apply the nondiscrimination principle to state laws regulating wine retailers in ways that favor local interests. *See Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *4 (summarizing different interpretations).

Some courts have followed the quartet of Supreme Court cases and held that state laws regulating liquor retailers are limited by the nondiscrimination principle of the Commerce Clause just like the law regulating liquor taxes in *Bacchus*, winery direct shipping in *Granholm*, and beer prices that could be charged by shippers in *Healy*. The leading circuit court case is *Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *3-5. The Seventh Circuit in a thorough opinion by Chief Judge Wood held that the nondiscrimination principle applied to state laws allowing in-state but not out-of-state retailers to ship wine to Illinois consumers and declared the Illinois law unconstitutional. In *Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730, 742-43 (5th Cir. 2016)), the Fifth Circuit applied the nondiscrimination principle and struck down a durational residency rule for retail licenses. In *Lebamoff*

Enterpr., Inc. v. Snyder, __ F. Supp. 3d ___, 2018 WL 4679612 at *4-5 (E.D. Mich. 2018), the district court found the language in *Granholm* clear and struck down a Michigan law that allowed in-state retailers to sell wine over the internet and ship or deliver it to consumers' homes, but prohibited out-of-state retailers from doing so.

Other courts have not extended the nondiscrimination principle to laws regulating retailers. In *Arnold's Wines v. Boyle*, 571 F.3d 185, 189-91 (2d Cir. 2009), a panel of the Second Circuit refused to apply the nondiscrimination principle to a New York law that gave in-state wine retailers exclusive rights to make home deliveries.[11] It said that laws regulating retailers were immune from challenge under the Commerce Clause and criticized this Court's decision in *Granholm* as "judicial activism." 571 F.3d at 197-98 (Calabresi, concurring). The Second Circuit seized on two phrases in *Granholm*. First, that state laws are "protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. It read this not as a restatement of the nondiscrimination principle but as a substantive limit upon it, i.e., that principle *only* applied to producers. *Contra Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *4

---

[11] The law at issue did not actually discriminate against interstate wine shippers because New York retailers were also banned from using common carriers to ship wine and had to deliver in their own vehicles. 571 F.3d at 188.

(*Granholm* did not draw a line between producers and retailers because the case before did not present that question). Second, that "[w]e have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489. The Second Circuit read this phrase not just as a restatement of the principle that the Twenty-first Amendment gives a state broad power to regulate alcohol distribution in even-handed ways, but as a substantive extension of that power to immunize even discriminatory laws from Commerce Clause scrutiny if they regulated the retail tier. In *So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809-10 (8th Cir. 2013), the Eighth Circuit went further and said that these two phrases in *Granholm* amounted to a "bright line between the producer tier and the rest of the system." It upheld a residency rule for liquor wholesaler licensees.

The Fifth and Sixth Circuits have sought a middle ground in which some state retailer laws are subject to the nondiscrimination principle and others are not, depending on whether they regulate an "inherent" aspect of a state's three-tier system. They derive this from language in two cases that did *not* involve a state law that discriminated against interstate commerce. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 332 says that "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984), says that the

issue in each case is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."

In *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819 (5th Cir. 2010), the Fifth Circuit defined the "inherent" aspects of retailing as retailers doing what retailers do, a not very helpful analytical tool. They upheld a law allowing in-state but not out-of-state retailers to take remote orders and ship wine to consumers in the immediate area of the store because these sales were "being made to proximate consumers, not those distant to the store," even though they no longer have to enter the store. It called these "conceptual" local sales. In *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 623 (6th Cir. 2018), the case now before the Court, the Sixth Circuit struck down a 2-year durational residency rule because where a licensee lived prior to becoming a licensee was irrelevant (not inherent to) to a three-tier system.

This middle-ground position has been criticized as unworkable by the Seventh and Eighth Circuits. In *So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d at 810, the Eighth Circuit said that '[t]here is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned." It noted that "*Granholm* itself involved two different versions of that system from New York and Michigan." The Seventh Circuit

agreed, noting that Illinois had 30 categories of liquor licenses, including ones for airplanes. A legal standard that allowed a state to discriminate with respect to some licenses whose operations are inherent to the three-tier system, but but not others would be unworkable. *Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *5. The district court in *Lebamoff Enterpr., Inc. v. Snyder*, __ F. Supp. 3d ___, 2018 WL 4679612 at *3 (E.D. Mich. 2018) similarly found the idea unworkable, noting that Michigan had "departed from a hermetically-sealed three-tier system when it chose to permit its [own] wine retailers to join the digital marketplace and engage in direct shipping to customers ... in a manner above-and-beyond that of a traditional three-tier system." Indeed, it is absurd to suggest that states still maintain a traditional three-tier system where alcohol sales are exclusively channeled through a wholesaler and retailer. Whatever may have once been the case, alcohol is no longer sold just at liquor stores to walk-in customers, but from hotel minibars, winery tasting rooms, brewpubs, craft distillers, grocery stores, farmers' markets, souvenir shops, airplanes, ships, football stadiums, wine clubs, and over the internet from out-of-state wineries.

There are at least three cases pending in the lower courts in which consumers complain that state laws regulating online retail wine sales discriminate against interstate commerce. In each, the state allows in-state retailers to take remote orders by internet or telephone and ship wine to consumers, but will not give out-of-state businesses the opportunity to apply

for any kind of similar shipping license. Consumers are effectively foreclosed from the national wine marketplace. *Lebamoff Enterpr., Inc. v. Snyder*, __ F. Supp. 3d ___, 2018 WL 4679612 at *4-5 (appeal pending); *Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 (remanded to N.D. Ill); and *Sarasota Wine Mkt. v. Parsons*, 4:17-cv-02792 (E.D. Mo.) (motion to dismiss pending). In each case, the parties are fighting over whether the nondiscrimination principle applies to laws regulating the retail tier. This Court needs to clarify the extent to which state liquor laws regulating retailers are constrained by the nondiscrimination principle.

C. Discrimination favoring in-state over out-of-state wine retailers violates the Commerce Clause and is not saved by the Twenty-first Amendment

This case concerns discriminatory residency rules for traditional bricks-and-mortar wine retailers, but it will set the precedent for internet retailers as well. This Court has noted that there is no longer a meaningful distinction between them. "Modern e-commerce does not align analytically with [old rules based on] physical presence," so the implementation of Commerce Clause doctrines today must accommodate the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2095, 2097 (2018). "A visit by a consumer to a favorite store is now an easy click away, regardless of where the physical storefront is located." *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124,

1135 (2015) (Kennedy, J., concurring). The Internet has changed the very structure of the retail marketplace. Last year, e-commerce retail sales were estimated at $453.5 billion. Dept. of Commerce, *U.S. Census Bureau News, Quarterly Retail E–Commerce Sales: 4th Quarter 2017* (CB18–21, Feb. 16, 2018), cited in *S.D. v. Wayfair, Inc.*, 138 S.Ct at 2097. Nearly 70% of Americans are shopping online. PricewaterhouseCoopers, *Understanding How U.S. Online Shoppers Are Reshaping the Retail Experience* 3 (Mar. 2012), cited in *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. at 135. If the Court were to decide that the nondiscrimination principle of the Commerce Clause does not apply to state regulation of liquor retailers, it would have a profound effect on (and effectively eliminate) internet sales for most consumers, because most internet retailers will be located in states other than the one in which a consumer resides. This would stand the Commerce Clause on its head.

The Commerce Clause has long been understood to deny states the power to discriminate against the flow of goods moving in interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. at 98. Regulatory measures that benefit in-state economic interests and burden their out-of-state competitors are virtually *per se* invalid whether the discrimination is purposeful or a matter of practical effect. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. at 578–79. A state can justify discrimination only by proving that the difference in treatment of in-state and out-of-state entities advances a legitimate local purpose that cannot

adequately be served by less discriminatory alternatives. *Granholm v. Heald*, 466 U.S. at 492-93. Given that forty-five states already allow other kinds of internet ordering and direct-to-consumer shipping (e.g., from wineries), it is hard to imagine that states will be able to meet this burden.

In *Granholm v. Heald*, this Court held that the nondiscrimination principle of the Commerce Clause applied to state liquor laws. It invalidated laws from Michigan and New York that allowed in-state wineries to sell and ship directly to consumers, but prohibited out-of-state wineries from doing so. Petitioner argues that the *Granholm* decision is not controlling in this case because it only applies to laws regulating wine producers and not to wine retailers. This argument is factually false. The wineries involved in the *Granholm* case were not only wine producers, they were also wine retailers. The Michigan statute at issue provided that "[t]he following classes of vendors may sell alcoholic liquor *at retail* .... (o) Wine maker where wine may be sold by direct shipment *at retail* on the licensed premises. Mich. Comp.L. §436.1537(1) (2004) (emphasis supplied). The discrimination between in-state and out-of-state wineries concerned the wineries' retail operations, not their production. In-state wineries could sell at retail and ship to consumers but out-of-state wineries could not. *Granholm* is direct precedent that the nondiscrimination principle applies to laws regulating wine retailers.

To the extent that Petitioner is contending that the Commerce Clause in general gives greater

protection to producers than retailers, the argument is without support. The case that first articulated the nondiscrimination principle 194 years ago did not involve producers, but boat companies shipping goods and passengers across the Hudson River. *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring). Retailing is the heart of commerce, and this Court has routinely applied Commerce Clause doctrine to retail transactions. *E.g., Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994) (mail-order sales); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73-74 (1963) (retail sale of used oil well equip-ment); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (retail sales). Not a single prior Supreme Court case has said that states are more free to discriminate against out-of-state retailers than out-of-state producers in any context.[12]

Petitioner also asserts that the Twenty-first Amendment changes (and weakens) how the nondiscrimination principle applies to state liquor laws and allows Tennessee to discriminate among retailers based on residency. It contends that the Amendment gives states broad power to regulate the retail sale of wine within their borders, up to and including the power to discriminate against out-of-state interests. *Granholm* rejected this argument. The Court held that "discrimination is neither authorized nor permitted by the Twenty-first Amendment," 544 U.S. at 466, which "does not allow States to regulate

---

[12] *See also Healy v. Beer Inst.*, 491 U.S. at 327-31 (nondiscrimination principle applies to both producers and shippers of beer).

the direct shipment of wine on terms that discriminate." 544 U.S. at 476. It said that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, that "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment," 544 U.S. at 489, and that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493.[13] The Court cited its prior holding in *Bacchus Imports, Ltd. v. Dias*, that the Twenty-first Amendment did not "empower States to favor local liquor industries by erecting barriers to competition," 468 U.S. at 276, and said in *Granholm* that this precedent "forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." 544 U.S. at 487-88. It also cited favorably Justice Scalia's concurrence in *Healy v. Beer Inst.*, 491 U.S. at 344, that a liquor "statute's invalidity is fully established by its facial discrimination against interstate commerce .. despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." 544 U.S. at 488

---

[13] *See Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *3 (once a state allows its in-state licensees to ship wine anywhere within the state, refusing to extend that privilege to out-of-state businesses is facially discriminatory).

Petitioner and its amici base their argument on a single phrase in *Granholm* where this Court noted that in *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990) it had "previously recognized that the three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489. Petitioner repeats this phrase in its main brief seven times (pp. 13, 16, 22, 35, 45, 46, 54), as if repetition could somehow elevate this phrase into a holding that discriminatory state laws are immune from Commerce Clause scrutiny. The argument is without merit, for three reasons.

First, the sentence appears in *Granholm* unaccompanied by any discussion, explanation, analysis or reasoning, and does not actually say anything about discriminatory state liquor laws. That is not the way this Court announces its holdings.

> We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall's sage observation that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Arkansas Game & Fish Com'n v. U.S., 568 U.S. 23, 35 (2012) (citation omitted).

Second, Petitioner is taking the phrase out of context, thereby distorting its meaning. The phrase appears in *Granholm* only after an extended

discussion of prior case law and the conclusion that the nondiscrimination principle applies to state regulation of alcohol. 544 U.S. at 486-88. In context, the Court was clarifying that its holding prohibiting discrimination did not cast into doubt the constitutional authority of states to make basic even-handed decisions about what kind of liquor distribution system to create. The Court says that

> A State [may choose] to ban the sale and consumption of alcohol altogether..., assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate."

544 U.S. at 488-89. The three-tier system is simply the licensing process by which a state regulates how alcohol arrives on retail shelves, which remains intact with or without residency requirements. There is not the slightest indication that the Court meant that states were free to discriminate as to who could obtain a license or that laws regulating retailers were exempt from its extensive prior discussion and conclusion that the nondiscrimination principle applied to state liquor laws. *See Lebamoff Enterpr. Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *5.

Third, the case from which the "unquestionably legitimate" sentence originates -- *North Dakota v. U.S.*,-- was a plurality opinion in a Supremacy Clause case about liquor sales on military bases that involved neither the Commerce Clause nor retailers nor

discrimination[14] and therefore cannot possibly be precedent that discriminatory wine retailer laws are immune from Commerce Clause scrutiny. *Arkansas Game & Fish Com'n v. U.S.*, 568 U.S. at 35. Indeed, the *Granholm* Court cautioned against this very interpretation

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding [that] discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

Granholm, 544 U.S. at 488-89.

The task for this Court is to weigh the strong federal interest in a national unified commercial marketplace against the core concerns of the Twenty-first Amendment. In *Granholm*, it said those core concerns were temperance and tax collection. 544 U.S. at 489. The requirement that a consumer may only buy wine from a retailer physically located in the state does not advance temperance because residents can purchase the same quantity of alcohol locally. Nor does it advance tax collection because a state can require internet retailers to collect and remit the same tax. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. at 2094 et seq. The law also is unnecessary to advance a

---

[14] Indeed, Justice Scalia joined the *North Dakota* plurality only because the law at issue was not discriminatory. 495 U.S. at 444 (Scalia, J., concurring).

state's secondary Twenty-first Amendment concerns, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability, because those objectives too can be achieved by requiring a license as a condition for making retail sales, and revoking that license for misbehavior. This how the states regulate their own in-state retailers. *Granholm*, 544 U.S. at 492.

Residency requirements just give economic protection to local businesses and protect them from competition at the expense of consumers. They are a type of local processing rule, which this Court has repeatedly condemned, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994), because it views "with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the court below that the nondiscrimination principle of the Commerce Clause prohibits Tennessee from imposing residency rules on the issuance of retail liquor licenses.

Respectfully submitted,

James A. Tanford
Counsel of Record
Robert D. Epstein
Epstein Cohen Seif
& Porter LLP
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 812-332-4966
tanfordl@indiana.edu
Attorneys for amici curiae

December, 2018

APPENDIX

A. NAMES OF INDIVIDUAL *AMICI*

Dr. Kosta Arger, Reno NV
Andrew Arntfield, Lewiston NY
Warren Ashenmil, New York, NY
Jeffrey A. Backerman, Concord MA
Faye Bainbridge, Sarasota FL
Jerry Bainbridge, Sarasota FL
Brad Barr, New York NY
Jeremy Bates, New York NY
Joshua Block, New York NY
Brent Bogen. Moline IL
David Boyer, Austin TX
Lee Braem, Maplewood NJ
Gillian Brassil, Brooklyn NY
Russell G. Bridenbaugh, Bloomington IN
Dr. Larry Buckel, Carmel IN
Kitty S. Buckel, Carmel IN
Dr. David Burack, Rock Hill SC
Dr. Harry Burack, St. Louis MO
Susan Burack, St. Louis MO
Anthony Caffrey, Laurel MD
Sharon Cantwell, Holladay UT
Emilio Castelli, Sebastopol CA
Doug Charles, Anacortes WA
Chris Church, Cedar Park TX
Jeffrey A. Clyde, New York NY
Aurelian Craiutu, Bloomington IN
J. Cory Curtis, Jackson WY
John F. Davis, Bloomington IN
Dr. David Deehr, Sandusky OH
Daniel Dixon, Bloomington IN

Ronald B. Dixon, Bloomington IN
Gregory Fehribach, Indianapolis IN
Adam Feild, New York NY
John J. Fisher, Boca Grande FL
Myra Gassman, Charlotte NC
Grant Gassman, Denver CO
David Geaney, Southampton NY
Layne Gentry, Houston TX
Joel Goldberg, Brighton MI
Dr. Pinkus Goldberg, Indianapolis IN
Rebecca Goldberg, Indianapolis IN
Larry Gralla, Reno NV
John Grier, Glenview IL
Sean Harding, Coto de Caza CA
Steven Harrison, Windsor CA
Eleanor Heald, Troy, MI
Ray Heald, Troy, MI
Manuel Hernandez-Martin, Bloomington IN
Franklin L. Hess, Bloomington IN
Robert Homan Igehy, New York NY
Mark W. Johnson, Sioux Falls SD
Gregory J. Kasza, Bloomington IN
Carrie B. Kingsley, New York, NY
Thomas Kisthart, Tampa FL
Deborah Kravitz, Healdsburg CA
Amber LeBeau, Snohomish WA
Philippe Loustaunau, Arlington VA
Jon Maxwell, Bozeman MT
David Moore, St. Louis MO
Will Parks, Anacortes WA
Dr. Sy Rabins, Sarasota FL
Dr. Martin Redish, Chattanooga TN
Dr. Gregory Redish, Dallas TX

Lisa K. Robertson, Chicago IL
Howard Rolston, Arlington VA
Arthur J. Rose, Warren MI
Mitchell Rubenstein, Boca Raton FL
Dr. Michael Schlueter, Detroit MI
Jack Schulz, Detroit MI
Kevin Sidders, Charlottesville VA
Neil Singer, Armonk NY
Timothy S. Spurlin, Greenbrier AR
Benjamin J. Steele, Long Island City NY
Jack Stride, Detroit MI
Dr. Charles Thomas, Indianapolis IN
Jon Thorsen, Shakopee MN
Joshua Valdez, San Francisco CA
Peggy Vetti, Franklin TN
Abby Vine, North Caldwell NJ
Harry Vine, North Caldwell NJ
David Waterman, Chicago IL
Frank D. Yeary, Berkeley CA

B. OTHER CONTRIBUTORS TO COST OF BRIEF

This brief was funded in part by contributions to a gofundme page. All contributors are listed below. No anonymous contributions were used to fund any costs of the preparation or submission of this brief.

Michael Aaron
John Abowd
Joshua Agrons
Anthony Aiuto
John Ammondson
Richard Ammons
Joe Arking
Robin Baggett
Carol Bailey
David Baker

Kevin Barcus
Thomas Batenhorst
Ketil Been
Azziza BenSaid
Joseph Bergfeld
Todd Berlinghof
Paul Best
Robin Bialer
Richard Bierman
Morris Birnbaum
Marc Borenstein
Todd Bostock
Lee Braem
Ashley Brandt
Turner Britton
Thomas Brundage
Alastair Bullett
Nicholas Calio
Paul Campbell
Gregory Carpenter
Robin Casaus
John Casey
Daniel Cedarbaum
Phillip Champon
Doug Charles
Cary Cheifetz
Thomas Chestnut
Lovantheran Chetty
Steven Clem
Alexander Crawford
Charles Curtis
Joseph D'Ambrosio
Pasquale DeMaio
David Dennigmann
Jaime de Pablos
Jason DeSalvo
Lori Dicorte
Joseph Doherty
Lisa Drakeman
Jess Dudley
Liam J. Duggan
Lawrence Dutra
Aris Economides
Nick Edes
Timothy Edwards
Tim Eldridge
Brad England
Jack Everitt
Craig Falls
Jeffrey Farber
Kendra Ferraro
James Field
Tom Flickinger
Eileen Fremont
David Friedman
Eric Friedman
Joe Galewski
Rick Gans
Mike Gatewood
Christian Gemar
Victor Gess
David Gillaspie
Peter Gottlieb
Dinesh Goyal
Katherine Granger
Douglas Graves

Daniel Greenberg
Robert Grenley
Bruce Grieve
Mark Grossbard
Jeffrey Grossman
Michael Grossman
Sean Haas
Lawrence Hamburger
Chelsea Hamilton
Charles Hamlin
Robert Hancock
Mark Hankin
Noelle Harman
Steven Harrison
Charley Hasemann
Scott Hasselman
Clifford Haugen
Stephen Haynes
Pat Hellberg
William Heller
Charles Henderson
Jim Hendrickson
Charles Hetzel
Jonathan Hochhauser
Christopher Hoel
Guy Hoffman
Richard Huber
Mel Ingold
John Ittner
Thomas Jacobs
Derek Jacobson
Gerald Johanneson
Paul Johnson
James Jones
Kelley Jones
Steve Joung
Peter Jupp
Ken Kailin
Arthur Kalira
Gary Keener
Norman Khoury
Jeff Kiefer
Joel Kilty
Thomas Kisthart
Knightsbridge Wine Shoppe
Robert Kopitsky
Mark Kovac
Jeffrey Kralik
Mark Kramer
Mitch Kysar
Steve Lane
Mark V. Langston
Linda Lawless
Michael Lazarus
Amber LeBeau
Jennifer Lee
Edward Levine
Benjmin Lewin
Craig Lison
William Loftus
Jeff Loomans
Willy Lum
John Maguire
Bryan Maletis
Earl Mangin

Michael Manners
Greg Martellotto
James Maynard
David McCann
William McClellan
John McGann
Jay McInerney
Bill McIver
Glenn A. Mcphee
Daniel Meloy
Peter Mesrobian
James Messac
Ross Michels
Jay Miller
Matthew Mirapaul
Ned Moody
Bill Moore
James Moseley
Leo Mueller
Cameron Myhrvold
Paul Nash
Phil Nelswender
William Nemerever
Charles Newhall
Gray Newman
John Noble
Steve Norman
James Ocasek
Charles Odgers
Megan Oglesby
Luther Ottaway
Any Pardeshi
Mark Parrotto
Gayle Pemberton
Scott Pendergast
Ken and Wendy Peters
Susan Petrovich
Addison Phillips
Mark Phillips
Doug Polaner
Kenneth Porrello
Albert Powers
Bruce Raben
Andrea Raffo
Paul Rasmussen
Michael Rauchman
Alison Raymond
Stephanie Reifers
Tom Riley
Dan Roberts
Stuart Roberts
Eric Roeper
Jessica Roma
Jeffrey Rosenberh
Sean Rositano
Michael Rothman
Bruce Rounds
David Sacco
Eric Schaefer
Elaine Schoch
Elizabeth Schneider
John Schreiner
Ian Scudder
Gustavo Scuseria
James Shandley
Douglas Skolnick

Stephan Shapiro
Kevin Sidders
David Small
David Smith
Jeffrey Staiman
James C. Stalder
Richard Stanback
Robin Stark
Andrew Steffensmeier
Donn Stoberski
Howard R. Stravitz
Richard Strier
Tracy Sue
Greg Tanner
Warren Taranow
Thomas Terry
Luke Trapp
Jeffrey Troy
Ken Tucker
Todd Tucker
Ken Vastola
Jim Viner
Russo Vosoughi
Eric Walker
Kengo Watanabe
Randy Wear
Robert Webb
Katie J. Weiner
Steven Weinstein
Daniel Wermeling
Kirke Wheeler
Alik Widge
Richard Wieder
Keith Wollenberg
John Wolfe
John Woods
Tom Yantis
Alder Yarrow
Randall Yuen
Alex Ziegler
Mike Zolik

No. 18-96

In The
Supreme Court of the United States

TENNESSEE WINE AND
SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF AMICUS CURIAE KHBC PARTNERS II, LTD. IN SUPPORT OF PETITIONER

HARRY HERZOG
HERZOG & CARP
427 Mason Park Blvd.
Katy, Texas 77450
Telephone: (713) 781-7500
HHerzog@hcmlegal.com

Counsel for KHBC Partners II, Ltd.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
Disclosure Statement and Interest of Amici Curiae	1
Summary of the Argument	1
Argument	4
1. The 21st Amendment	4
2. The uniqueness of alcohol regulations	6
A. State police powers	6
B. Adding the 21st Amendment to state police powers creates unique and exceptional state powers	6
1. States have broad regulatory power in liquor	7
2. Broad regulatory power includes wide latitude	7
3. Broad regulatory power, with wide latitude within the constitutionally sanctioned zone of state control, creates special power in the states	8
4. The 21st Amendment grants states virtually complete control over local alcohol sales	8
C. The three-tier system	9
D. Strong presumption of validity	9
3. Congress wants the power over local alcohol sales vested in the states	9
4. The rationale for the dormant Commerce Clause	12

TABLE OF CONTENTS – Continued

Page

5. U.S. Supreme Court analysis and standards 14
   A. Improper state legislation or regulation nullified 14
      1. They conflicted with a federal law or impinged on a federal area 14
      2. They extended state regulation into other states 15
      3. They were economic protectionism designed to disfavor out of state products 15
   B. Lack of Congressional action eliminates or minimizes application of the dormant Commerce Clause 15
   C. Other principles in dormant Commerce Clause analysis 18
   D. Cases supporting residency requirements 20
   E. "Core §2 power" analysis 21

Conclusion 21

APPENDIX

Passage of the 21st Amendment ..... App. 1

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES

324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720 (1987) 8, 14

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049 (1984) 15

Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 55 S. Ct. 497 (1935) 5

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S. Ct. 2080 (1986) 14

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962 (1959) 16

C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 114 S. Ct. 1677 (1994) 12

California Retail Liquor Dealers Assoc. v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937 (1980) 7, 8, 14, 19

Capital Cities Cable v. Crisp, 467 U.S. 691, 104 S. Ct. 2694 (1984) 8, 14

Carter v. Virginia, 321 U.S. 131, 64 S. Ct. 464 (1944) 5, 16

Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 375 S. Ct. 180 (1917) 10

City of Newport, Ky. v. Iacobucci, 479 U.S. 92, 107 S. Ct. 383 (1986) 7

Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 58 S. Ct. 1009 (1938) 14

TABLE OF AUTHORITIES – Continued

Page

Cooley v. Board of Wardens, 429 U.S. 190, 97 S. Ct. 451 (1976) 12, 15, 16

Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976) 10, 19

Dept. of Revenue v. James B. Beam Distiller Co., 377 U.S. 341, 84 S. Ct. 1247 (1964) 14

Duckworth v. Arkansas, 314 U.S. 390, 62 S. Ct. 311 (1941) 16, 17

Exxon Corp. v Maryland, 437 U.S. 117, 98 S. Ct. 2207 (1978) 13

Goesaert v. Cleary, 335 U.S. 464, 69 S. Ct. 198 (1948) 6

Granholm v. Heald, 544 U.S. 460, 125 S. Ct. 1885 (2005) 8, 9, 10, 15, 19

Healy v. The Beer Institute, 491 U.S. 324, 109 S. Ct. 2491 (1989) 15

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 342, 84 S. Ct. 1293 (1964) 14

Heublein, Inc. v. South Carolina Tax Commission, 409 U.S. 275, 93 S. Ct. 483 (1963) 20

In re: State Freight Tax, 82 U.S. (15 Wall.) 232 (1873) 12

Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 86 S. Ct. 1254 (1966) 4, 7

Leisy v. Hardin, 135 U.S. 100, 10 S. Ct. 681 (1890) 10

New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2599 (1981) 7

TABLE OF AUTHORITIES – Continued

Page

North Dakota v. U.S., 495 U.S. 423, 110 S. Ct. 1986 (1990) 8, 9

Premier-Pabst Sales Co. v. Grosscup, 298 U.S. 226, 56 S. Ct. 754 (1936) 20

Railroad Company v. Husen, 95 U.S. 465 (1877) 5

Reading Railroad Co. v. Pennsylvania, 82 U.S. (15 Wall.) 232, 271-83 (1873) 12

Rice v. Rehner, 463 U.S. 713, 103 S. Ct. 3291 (1983) 6, 10

Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 65 S. Ct. 1515 (1945) 18

The License Cases, 46 U.S. (5 How.) 504 (1847) 9

U.S. v. Frankfort Distilleries, 324 U.S. 293, 65 S. Ct. 661 (1945) 7

U.S. v. State Tax Commission of Mississippi, 412 U.S. 363, 93 S. Ct. 2183 (1973) and after remand 419 U.S. 1104, 95 S. Ct. 1872 (1975) 7, 14

Vance v. W.A. Vanderbrook Co., 170 U.S. 438, 18 S. Ct. 674 (1898) 20

Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507 (1971) 6

U.S. CONSTITUTION

AMENDMENTS

U.S. Const. amend. 10 6

U.S. Const. amend. 18 4

U.S. Const. amend. 21 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 1161 10

27 U.S.C. § 121 10

27 U.S.C. § 122 10

27 U.S.C. § 122a 10

42 U.S.C. § 290bb-25b 11

CONGRESSIONAL RECORD

Cong. Rec. Vol. 76, Part 4, pp. 4138-89 (Feb. 15, 1933) 11

FEDERALIST PAPERS

Federalist Papers #22 12

DISCLOSURE STATEMENT AND INTEREST OF AMICI CURIAE[1]

We know of no possible basis for recusal by any member of the court. KHBC Partners II, Ltd. is privately owned. KHBC, its owners and counsel have no personal or business connection to any justice of this Court.

The undersigned counsel authored this entire brief without notice to or consultation with any lawyer in this case, and after reading what he believes is every case ever decided by any court under the 21st Amendment. KHBC and counsel want this Court to reach a correct result for the right reasons.

SUMMARY OF THE ARGUMENT

Since Congress cannot regulate who gets a permit to sell alcohol locally, the judiciary should not utilize the dormant Commerce Clause to regulate who can get those permits. The 21st Amendment empowers only states to grant local permits implementing the three-tier system. States have exceptional, transcendent, and overwhelming power over their constitutionally exclusive zone of control to govern the local sale of

[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus itself provided any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief through waivers.

alcohol. Congress has no such power; therefore, the use of the dormant Commerce Clause to deprive states of their power to control permits for local retail alcohol sales is inappropriate. The judicial effort to protect non-existent Congressional power has created doctrinal disarray that should be resolved by holding that each state has the authority under the 21st Amendment to set standards for who may possess a permit to locally sell alcohol without impingement by the dormant Commerce Clause.

Shortly after prohibition banned the manufacture, distribution or sale of alcohol the people of this nation rose up. In less than a year, through Congress and state conventions, the people overwhelmingly passed the 21st Amendment. It vests exclusive power over the local sale and distribution of alcohol at the state level. In drafting the 21st Amendment, Congress explicitly declined concurrent power over local alcohol sales. Improper utilization of the dormant Commerce Clause takes that power over local alcohol sales away from states and misplaces it in the federal judiciary.

The essence of the dormant Commerce Clause is preservation of Congress' exclusive power to regulate commerce among the states and thus prevent the creation of protectionist barriers that would distort the free flow of goods across state lines. With respect to the constitutionally unique product of alcohol, Congress has spent 128 years ceding regulatory power to the states. This includes expressly declining concurrent power when the 21st Amendment was drafted. As recently as 2010, Congress wrote into law that alcohol is

a unique product and States have primary authority to regulate alcohol distribution and sale.

Some members of the federal judiciary erroneously decrease state authority to regulate the local sale of alcohol, preserving non-existent Congressional authority in the area. They use the dormant Commerce Clause to judicially dive into waters where Congress constitutionally cannot swim. This Court should hold that the dormant Commerce Clause does not apply to any states' exercise of their virtually complete control over how to structure the retail tier of the three-tier system.

When a state grants a permit to sell liquor locally the state does not impinge on a federal area, encroach extraterritorially on other states, or impact the interstate flow of any product. Congress' inaction in local permitting increases the sphere of state influence. Congress' constitutional inability to act with respect to local permitting should extend the expanded sphere of state influence beyond the reach of the dormant Commerce Clause. The principles of the dormant Commerce Clause enunciated by this Court when it last considered the 21st Amendment do not support applying the dormant Commerce Clause to state permits for local alcohol sales.

ARGUMENT

1. The 21st Amendment.

The 21st Amendment is incredibly unique. It is the only provision in the U.S. Constitution that:

a. Grants power to states;

b. Overturns a separate amendment;

c. Passed by state conventions, the people acting directly rather than by legislature;

d. Was passed by the U.S. Senate, House, and 37 states in less than 10 months (Appendix 1), and

e. Is limited to one consumer product.

The 21st Amendment allocates all of the governmental power to create a system to regulate local alcohol sales to the states. Thus, any challenge to that legislation must begin with an analysis of the 21st Amendment. "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment. . . ." *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 43, 86 S. Ct. 1254, 1259 (1966).

The dormant Commerce Clause protects the free flow of commerce. The 18th and 21st Amendments expressly ban some commerce in alcohol or allow states to restrict commerce, hence the inherent tension. When prohibition passed it eliminated the application of the dormant Commerce Clause to the manufacture, sale, or transportation of alcohol. When prohibition

failed miserably and was repealed by the 21st Amendment, the dormant Commerce Clause was modified with respect to alcohol. Many states continued to ban the manufacture or sale of alcohol after the 21st Amendment passed in 1933: for example, Mississippi banned all distilled beverages until 1966, and 33 states have dry counties today. For any other product such a ban violates the dormant Commerce Clause. *Railroad Company v. Husen*, 95 U.S. 465 (1877) (cattle); *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 55 S. Ct. 497 (1935) (milk). But a ban on the sale of alcohol is unquestionably constitutional. For decades courts have struggled to balance and harmonize the dormant Commerce Clause with the 21st Amendment. The tension and difficulties inherent in this area are properly resolved by reviewing all of the phenomenal powers granted to states against the rationale for the dormant Commerce Clause.

The lower courts in this case went exactly where courts were warned not to go in 1944: they embarked on the "impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a 'reasonable regulation' of liquor traffic." *Carter v. Virginia*, 321 U.S. 131, 142, 4 S. Ct. 464, 471 (1944, Frankfurter concurring).

2. The uniqueness of alcohol regulation.

A. State police powers.

All states have police powers. They had them before the constitution was written, after the constitution was adopted in 1789, and then the 10th Amendment preserved them in 1791.

State regulation of liquor traffic is "one of the oldest and most untrammeled of legislative powers." *Goesaert v. Cleary*, 335 U.S. 464, 465, 69 S. Ct. 198, 199 (1948). The state police power to regulate liquor precedes and is independent of the 21st Amendment's added powers. *Rice v. Rehner*, 463 U.S. 713, 723, 105 S. Ct. 3291, 3298 (1983). State police powers over liquor were "extremely broad even prior to the Twenty-first Amendment." *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 509 (1971).

B. Adding the 21st Amendment to state police powers creates unique and exceptional state powers.

The Constitution begins with its three most powerful words: "We the people . . . " Only one constitutional provision was created directly by the people: the 21st Amendment. The people of this country created it with phenomenal speed. Since 1933, a unique body of law limited exclusively to alcohol has necessarily developed. In the historically dangerous area of distilled beverages courts have been justifiably supportive of states' legislative discretion. The unique aspects of the 21st Amendment plus state police powers combine to

grant exceptional power to the states to regulate the local sale of alcoholic beverages. This exceptional power has been expressed by this Court through various legal principles or phrases.

1. States have broad regulatory power in liquor.

"Broad regulatory power" and "full authority," *U.S. v. Frankfort Distilleries*, 324 U.S. 293, 297-301, 65 S. Ct. 661, 664-65 (1945); "broad regulatory power," *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 41, 86 S. Ct. 1254, 1259 (1966); "broad regulatory authority," *U.S. v. State Tax Commission of Miss.*, 93 S. Ct. 2183, 2189 (1973); "broad power," *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 714, 101 S. Ct. 2599, 2600 (1981); and "broad regulatory powers," *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 93, 107 S. Ct. 383, 385 (1986).

2. Broad regulatory power includes wide latitude.

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 41, 86 S. Ct. 1254, 1259 (1966); *California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 445 U.S. 97, 106, 100 S. Ct. 937, 944 (1980).

3. Broad regulatory power, with wide latitude within the constitutionally sanctioned zone of state control, creates special power in the states.

California Retail Liquor Dealers Assoc. v. Midcal Aluminum, 445 U.S. 97, 106, 100 S. Ct. 937, 944 (1980).

4. The 21st Amendment grants states virtually complete control over local alcohol sales.

"The Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system."

> *California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 445 U.S. 97, 110, 100 S. Ct. 937, 946 (1980),
>
> quoted and reaffirmed in:
>
> *Capital Cities Cable v. Crisp*, 467 U.S. 691, 715, 104 S. Ct. 2694, 2709 (1984);
>
> *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345, 107 S. Ct. 720, 726 (1987);
>
> *North Dakota v. U.S.*, 495 U.S. 423, 431, 110 S. Ct. 1986, 1992 (1990); and
>
> *Granholm v. Heald*, 544 U.S. 460, 488, 125 S. Ct. 1885, 1905 (2005).

There may be no area of constitutional law in which states have greater legislative control. There is no other product over which states have explicit

constitutional authority. Congress has spent 128 years ceding legislative power over local liquor sales to states.

C. The three-tier system.

This Court noted that the three-tier system is constitutional in *North Dakota*, 495 U.S. at 432. Fifteen years later, in the most recent case this Court decided under the 21st Amendment, this Court re-affirmed that the three-tier system is "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*).

D. Strong presumption of validity.

In light of the 21st Amendment's special protection of state liquor control policies, "they are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota*, 495 U.S. at 433. Any reading of history concerning the sale of liquor instantly affirms the wisdom of this added deference and corresponding reticence to cast aside legislative prerogatives.

3. Congress wants the power over local alcohol sales vested in the states.

In the 1700s and 1800s a variety of states regulated the sale of alcoholic beverages. Before the Civil War this Court affirmed broad state authority over alcohol sales in *The License Cases*, 46 U.S. (5 How.) 504,

579 (1847). This Court decreased state authority to regulate the sale of alcohol in *Leisy v. Hardin*, 135 U.S. 100, 10 S. Ct. 681 (1890). Congress immediately reacted by reinvigorating state authority through passage within a few months of the Wilson Act, 27 U.S.C. § 121 (1890); summarized in *Craig v. Boren*, 429 U.S. 190, 205, 97 S. Ct. 451, 461 (1976). Congress eliminated a loophole in the Wilson Act with the later passage of the Webb-Kenyon Act, 27 U.S.C. § 122 (1913), which removed the protection of interstate commerce from all receipt and possession of liquor prohibited by state law. *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 325, 375 S. Ct. 180 (1917). The 21st Amendment language was designed in part to constitutionalize the language of the Wilson and Webb-Kenyon Acts. *Craig*, 429 U.S. at 206, 462; *Granholm v. Heald*, 544 U.S. 460, 483, 125 S. Ct. 1885, 1902 (2005).

Congress has repeatedly transformed power Congress might have over the distribution system for local alcohol sales into state power.

1. Wilson Act, 27 U.S.C. § 121 (1890);
2. Webb-Kenyon Act, 27 U.S.C. § 122 (1913);
3. Passage of the 21st Amendment (1933);
4. 18 U.S.C. § 1161 (1953), by which Congress authorized state regulation over Indian liquor transactions. *Rice v. Rehner*, 463 U.S. 713, 723, 103 S. Ct. 3291, 3299 (1983);
5. 27 U.S.C. § 122a (2000), the 21st Amendment Enforcement Act; and

6. 42 U.S.C. § 290bb-25b (2006) ("Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts.").

The most important Congressional expression of relinquishment of power over local alcohol sales came in the drafting of the 21st Amendment. One draft gave Congress much more power than they wanted. This provision was proposed and then deleted during Congressional debate:

> "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."

Cong. Rec. Vol. 76, Part 4, pp. 4138-39 (Feb. 15, 1933). As passed by Congress and the 38 states that ratified it, the 21st Amendment does *not* grant Congress concurrent power to regulate the retail sale of intoxicating liquors.

Congress having deprived itself of concurrent power over local alcohol sales, and 38 states having agreed, there is no intellectual justification for re-writing the 21st Amendment through the backdoor by applying the dormant Commerce Clause to "preserve" non-existent Congressional power over local alcohol sales. Since it is constitutionally impossible for Congress to regulate who may possess a permit to sell tequila at the corner store it is improper for courts to utilize the dormant Commerce Clause to strike down state rules on who may possess that permit.

4. The rationale for the dormant Commerce Clause.

When the Articles of Confederation were adopted in 1781 the Congress had no power to regulate commerce. This failure was one of the leading causes of the creation of the constitution. As Alexander Hamilton noted, lack of federal power over commerce created "occasions of dissatisfaction between the States" and made negotiation of trade treaties with foreign nations difficult or impossible. Federalist Papers #22. To protect the flow of commerce Congress was given the exclusive power to regulate commerce among the several states. The theory of the dormant Commerce Clause first arose in 1851 to preserve Congressional power to exclusively regulate interstate commerce. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). The first use of the dormant Commerce Clause to negate a state law was after the Civil War. *In re: State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873); *Reading Railroad Co. v. Pennsylvania*, 82 U.S. (15 Wall.) 232, 271-83 (1873).

The central rationale for the dormant Commerce Clause is to prohibit "state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390, 114 S. Ct. 1677 (1994). Courts strike down "local laws that impose commercial barriers or discriminate against an article of commerce." *C & A*, 511 U.S. at 390.

When courts improperly utilize the dormant Commerce Clause they usually lose sight of *commerce*. The Commerce Clause relates to commerce among the States, foreign nations, and Indian tribes. The dormant Commerce Clause thus also relates to commerce. The dormant Commerce Clause preserves Congressional power over commerce. It protects a national market, not who participates in the national market.

> "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce . . . the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."

Exxon Corp. v. Maryland, 437 U.S. 117, 126-27, 98 S. Ct. 2207 (1978).

Dormant Commerce Clause jurisprudence springs from the implication that states cannot conflict with Congressional power and impede the flow of interstate goods. It would be impossible for Congress to enact a regulation governing the local sale of alcoholic beverages within a state as the 21st Amendment vests all of that power within each state. Regulating who may possess a permit to locally sell liquor does not impede the flow of one bottle of distilled beverages from the other 49 states, and Congress cannot license local package stores. Thus the dormant Commerce Clause should not be improperly used to preserve Congressional power to do what Congress cannot do with respect to awarding or denying permits for local retail alcohol sales.

5. U.S. Supreme Court analysis and standards.

A. Improper state legislation or regulations nullified.

Since 1933 this Court has struck down a variety of state alcohol legislation or regulations. But all fit into these three categories:

1. They conflicted with a federal law or impinged on a federal area.

National parks.	*Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S. Ct. 1009 (1938)
International travel.	*Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 342, 84 S. Ct. 1293 (1964)
Export-import clause.	*Dept. of Revenue v. James B. Beam Distiller Co.*, 377 U.S. 341, 84 S. Ct. 1247 (1964)
Military bases.	*U.S. v. State Tax Commission of Mississippi*, 412 U.S. 363, 419 U.S. 1104, 93 S. Ct. 2183 (1973) and 95 S. Ct. 1872 (1975)
Sherman antitrust.	*California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980)
	324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720 (1987)
Cable television signal retransmission.	*Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S. Ct. 2694 (1984)

2. They extended state regulation into other states.

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S. Ct. 2080 (1986).

Healy v. The Beer Institute, 491 U.S. 324, 109 S. Ct. 2491 (1989).

3. They were economic protectionism designed to disfavor out-of-state products.

- Tax exemption for locally produced wine.

  Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049 (1984)

- Ban on out-of-state winery direct shipments to consumers, while in-state wineries could direct ship to consumers.

  Granholm v. Heald, 544 U.S. 460, 125 S. Ct. 1885 (2005).

None of those improper actions are in issue here.

B. Lack of Congressional action eliminates or minimizes application of the dormant Commerce Clause.

Congress' ability to regulate interstate commerce has never deprived states of all ability to regulate commerce, especially at the local level. This is especially true when Congress declines to act and leaves regulation to the states. *Cooley v. Board of Wardens*, 53 U.S.

299, 320 (1851). In a case dealing with mudguard fenders, this Court referred to a state having "exceptional scope for the exercise of its regulatory power" and emphasized that "Congress not acting" results in sustaining state regulations "even though they materially interfere with interstate commerce." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524, 79 S. Ct. 962, 965 (1959). In local alcohol sales states have more than exceptional scope for the exercise of their regulatory power: their regulatory powers reach to their constitutional zenith and apex. Their police powers, the only constitutional grant of powers to states, and the elimination of concurrent Congressional power over local alcohol sales combine to create virtually complete control: full authority through exceptional and broad regulatory powers with the widest possible latitude.

The principle of *Cooley* has been applied to alcohol after the 21st Amendment. This Court clearly enunciated the rule:

> "While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce."

Duckworth v. Arkansas, 314 U.S. 390, 394, 62 S. Ct. 311, 313 (1941); *see also Carter v. Virginia*, 321 U.S. 131, 135, 64 S. Ct. 464, 467 (1944). Applying this principle

to state legislation governing the transportation for sale of alcohol without a permit this Court concluded:

> "Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end. The Arkansas statute does not conflict with any act of Congress. It does not forbid or preclude the transportation, or interfere with the free flow of commerce, among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state. It does not violate the commerce clause." *Duckworth*, 314 U.S. at 396.

Four years later (between the German and Japanese surrenders) this Court summarized this area of law:

> "Ever since *Willson v. Black-Bird Creek Marsh Co.* and *Cooley v. Board of Wardens* it has been recognized that in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. Thus, the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight,

> such regulation has been generally held within state authority."

Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 766-67, 65 S. Ct. 1515 (1945) (internal citations omitted). The effect of the 21st Amendment is that Congress may never deal with (nevertheless adequately deal with) who gets permits to locally sell alcohol in each state. Therefore, each states' determination of who gets a permit should be insulated from dormant Commerce Clause scrutiny.

More than a dozen states have monopolies on the sale of distilled beverages. For alcohol those state monopolies are constitutional. The same 21st Amendment that lets Virginia control the retail sale of bourbon within the Commonwealth also allows other states to control permits to conduct local retail sales of alcohol. Since there can never be federal policy on who gets a permit to run the corner liquor store, the method by which each state grants those permits cannot conflict with federal policy, cannot impede Congressional power, does not affect the flow of commerce among the states, and therefore does not violate the dormant Commerce Clause.

C. Other principles in dormant Commerce Clause analysis.

This Court has noted that the commerce clause and 21st Amendment are in one constitution and must be harmonized, with the 21st Amendment creating an exception to the normal operation of the commerce

clause. *Craig*, 429 U.S. at 461; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 108, 100 S. Ct. 937, 945 (1980). In *Granholm*, this Court emphasized these goals, purposes, and rules that underlie that harmony:

- No differential treatment of out-of-state economic interests p.472
- No burdens on out-of-state producers p.472
- States cannot be compelled to negotiate p.472
- Minimize or eliminate state rivalries p.472
- Avoid the proliferation of trade zones pp.472-73
- Cannot deprive citizens of access to markets p.473
- States cannot require an out-of-state firm to become a resident p.475
- No discrimination against imported liquor p.476
- No impermissible burdens on interstate commerce p.477
- In-state and out-of-state liquor must be treated on the same terms p.481
- Non-discrimination against out-of-state goods p.483

Analysis of these principles and application of them to the decision by each state on how to award permits for the local retail sale of alcohol should result in a decision that the dormant Commerce Clause does not apply to a states' implementation of the three-tier system with respect to who receives a permit.

D. Cases supporting residency requirements.

This Court has never intensely analyzed, focused on, or squarely ruled on the precise issue involved here, but it has supplied some glancing blows in the past. Shortly after passage of the Wilson Act, but well before the 21st Amendment, this Court viewed a hypothetical residency requirement for a liquor license as appropriate. *Vance v. W.A. Vanderbrook Co.*, 170 U.S. 438, 451, 18 S. Ct. 674 (1898). Three years after the passage of the 21st Amendment all parties in a case conceded the constitutional validity of a two-year durational residency requirement and this Court enforced that requirement to determine standing. *Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226, 228, 56 S. Ct. 754 (1936). In a tax case three decades later, this Court made reference to South Carolina's law requiring a "resident representative" as an "appropriate element in the State's system of regulating the sale of liquor." *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 277, 283-84, 93 S. Ct. 483 (1963).

E. "Core §2 power" analysis.

Over the past few decades this Court has created and applied a "core §2 power" analytical approach to the 21st Amendment. The essence of the analysis is that the dormant Commerce Clause imposes no limit on state power when the state is exercising its core §2 power to directly regulate the sale of liquor within the state in a manner that does not discriminate against out-of-state alcoholic products. Nothing more directly regulates the local sale of liquor than deciding who can obtain a permit or license to sell the liquor. Nothing is further from the reach of the dormant Commerce Clause than the determination of who can own the corner liquor store. That determination is the implementation of a core §2 power the people of this nation granted exclusively to the states. That core §2 power should stay with the states: it does not belong in the federal judiciary.

CONCLUSION

Judicial efforts to apply the dormant Commerce Clause to preserve Congressional power to regulate aspects of the three-tier system beyond Congress' power to regulate are intellectually erroneous. They extend the power of the judiciary into a legislative area in which Congress has no authority to legislate, while simultaneously depriving states of powers historically exercised by states since the 1700s and then expressly granted to the states by Congress and the American

people in 1933. This Court should hold that any state legislation or regulation governing the permitting or licensing of the retail tier for local alcohol sale within a state is impervious to attack from the dormant Commerce Clause.

Respectfully submitted,

HARRY HERZOG
HERZOG & CARP
427 Mason Park Blvd.
Katy, Texas 77450
Telephone: (713) 781-7500
Fax: (713) 781-4797
HHerzog@hcmlegal.com
Counsel for KHBC Partners II, Ltd.

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR LAW AND ECONOMICS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RENEE M. KNUDSEN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for the Amici Curiae

QUESTION PRESENTED

Whether the court of appeals correctly held that the Twenty-first Amendment does not empower states to withhold a retail liquor license from an otherwise eligible applicant simply because the applicant has not resided in the state for a specified number of years?

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Public Choice Economics Analyzes How Special Interest Groups Act to Advance Their Own Interests 5

II. Tennessee's Residency Requirements Benefit Incumbent Retailers at the Expense of Consumers and Competitors 9

A. Tennessee's Durational Residency Requirements Are a Classic Example of Rent-Seeking Law 11

B. Tennessee's Durational Residency Requirements Raise Prices for Consumers, Confirming Their Rent-Seeking Nature 13

C. Tennessee's Durational Residency Requirements Advance No Legitimate Local Purpose 17

III. Upholding Tennessee's Durational Residency Requirements Would Open the Door to Anti-Consumer Rent-Seeking on a Massive Scale 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 13, 14

Best v. Maxwell,
311 U.S. 454 (1940) 14

Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan,
370 P.3d 1170 (2016) 4

Campion, Barrow & Assocs. v. City of Springfield, 559 F.3d 765 (7th Cir. 2009) 4

C&A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 14

Granholm v. Heald,
544 U.S. 460 (2005) 2, 13, 17, 20, 21

Henson v. Santander Consumer USA Inc.,
137 S. Ct. 1718 (2017) 18

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976) 13

Hughes v. Oklahoma,
441 U.S. 322 (1979) 10

Northwest Airlines, Inc. v. Wis. Dep't of Revenue,
717 N.W.2d 280 (Wis. 2006) 18

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 10

Riley v. St. Luke's Episcopal Hosp.,
252 F.3d 749 (5th Cir. 2001) 4

Sensational Smiles, LLC v. Mullen,
793 F.3d 281 (2d Cir. 2015) 4

Smith v. Nat'l Transp. Safety Bd.,
981 F.2d 1326 (D.C. Cir. 1993) 18

West Lynn Creamery v. Healy,
512 U.S. 186 (1994) 14

STATUTES AND RULES

Cal. Civ. Proc. Code § 1218 19

Conn. Gen. Stat. § 51-33 19

N.Y. Judiciary Law § 753 19

Tenn. Code Ann. § 29-9-103 19

Tenn. Code Ann. § 57-3-204(b)(2)(A) 9

Tenn. Code Ann. § 57-3-204(b)(3)(A) 9

Tenn. Code Ann. § 57-3-204(b)(4) 17, 21

Tex. Gov't Code § 21.002 19

Va. Code Ann. § 18.2-457 19

OTHER AUTHORITIES

About TWSRA, Tennessee Wine & Spirits
Retailers Association 3, 11

Robert D. Atkinson, *Revenge of the
Disintermediated: How the Middleman is
Fighting E-Commerce and Hurting Consumers*,
Progressive Policy Institute (Jan. 26, 2001) 16

Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968) 19

James M. Buchanan, *Rent Seeking and Profit Seeking*, in *Toward a Theory of the Rent-Seeking Society* (James M. Buchanan et al. eds., 1980) 7

James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091 (2005) 6, 7, 8

John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 Antitrust L.J. 1075 (2005) 6

Jerry Ellig & Alan E. Wiseman, *Price Effects and the Commerce Clause: The Case of State Wine Shipping Laws*, 10 J. Empirical Legal Stud. 196 (2013).. 14, 16, 22

Jerry Ellig & Alan E. Wiseman, *The Economics of Direct Wine Shipping*, 3 J.L. Econ. & Pol'y 255 (2007) 15, 16

The Federalist No. 10 (James Madison) 7

FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2013) 1

Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 Chi.-Kent L. Rev. 165 (2018) 11

Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986) 6

Joseph J. Minarik, Taxation, *A Preface, in The Concise Encyclopedia of Economics* (1st ed. 1993) 18

Dennis C. Mueller, *Public Choice III* (2003) 6

Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 Antitrust L.J. 505 (2008) 21, 22

Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971).. 11

Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. Crim. L. & Criminology 765 (2010) 19

Richard A. Posner, *Economic Analysis of Law* (4th ed. 1992) 18

Quick Facts: Tennessee, U.S. Census Bureau 12

Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, 27 Reg. 30 (2004)..... 21

Maxwell L. Stearns, Todd J. Zywicki & Thomas J. Miceli, *Law and Economics: Private and Public* (2018) 2

Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* (1st ed. 2009) 7, 12

George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ & Mgmt. Sci. 5 (1971) 9

Tennessee: Alcohol Consumption, Center for Disease Control 12

Alan E. Wiseman & Jerry Ellig, *The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause*, 69 J. Politics 859 (2007) 16

Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & Liberty 609 (2005) 14

INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* submitting this brief are economists, law and economics scholars, and former Federal Trade Commission officials who teach, conduct research, and publish on economics and economic regulation and are therefore interested in the development of the Court's Commerce Clause jurisprudence.

Donald J. Boudreaux is Professor of Economics at George Mason University and former chairman of GMU's Economics Department. He has published extensively on the economics of competition and antitrust and on public-choice economics.

Lloyd R. Cohen is Professor of Law at the Antonin Scalia Law School at George Mason University and previously taught law at Chicago-Kent College of Law and was a John M. Olin Research Fellow at the University of Chicago. He has published scholarship on a variety of applications of economics to law.

Jerry Ellig is a Research Professor at the Regulatory Studies Center at The George Washington University. He previously served as Chief Economist of the Federal Communications Commission, Deputy Director of the Office of Policy Planning at the FTC, and a Senior Economist at the Joint Economic Committee of the U.S. Congress. He is a coauthor of the FTC Staff Report, *Possible Anticompetitive Barriers to*

---

[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

E-Commerce: Wine (July 2013), which was cited extensively by the majority opinion in *Granholm v. Heald*, 544 U.S. 460 (2005).

Theodore A. Gebhard served as Senior Antitrust Policy Advisor at the FTC, as a Senior Antitrust Economist and Director of Economic Research for Export Trading Company Affairs at the Department of Commerce, and as an economist in the Antitrust Division of the Department of Justice. He taught economics at DePaul University and Eastern New Mexico University. He now consults on matters of law and economics and writes widely in the field.

Todd J. Zywicki is George Mason University Foundation Professor of Law at the Antonin Scalia Law School at George Mason University, a Senior Fellow of the Cato Institute, a Senior Fellow at the James Buchanan Center for Political Economy Program on Philosophy, Politics, and Economics, and former Executive Director of the Law & Economics Center. He previously served as the Director of the Office of Policy Planning at the FTC and is co-author of the law school textbook *Law and Economics: Private and Public* (2018), with Maxwell Stearns and Tom Miceli.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Tennessee's facially discriminatory durational residency requirements for obtaining and renewing a retail liquor license cannot be reconciled with the dormant Commerce Clause's prohibition on discrimination in interstate commerce. Application of public choice economic theory to this case explains that Tennessee's residency requirements are exactly the kind of protectionist measure, divorced from legitimate need, that results when concentrated special interests, such as alcohol retailers within a state, lobby state government for rent-seeking legislation to protect their own economic interests by restricting out-of-state competitors. The ultimate harm from this system falls on consumers, from whom higher prices are exacted for the benefit of this lobby.

Rent-seeking legislation typically arises when there is, as here, a concentrated or well-organized interest with something to gain from consumers or the public at large. The Petitioner, Tennessee Wine & Spirits Retailers Association, is such an interest, proudly proclaiming on its website that, by "represent[ing] more than 500 liquor store owners across Tennessee," it can present "a powerful, cohesive stand that legislators and regulators cannot ignore." *See About TWSRA*, Tennessee Wine & Spirits Retailers Association.[2] Often, as here, the resulting legislation takes the form of barriers to competition, such as the exclusion of potential competitors. And, again as here,

---

[2] *Available at* http://www.twsra.com/content/about-twsra.

the proponents of such legislation almost always seek to justify these measures on pretextual public-interest grounds, making arguments at odds with mainstream regulatory economics, which focuses on things like incentives and prices that directly generate desired outcomes. Here, for example, a state seeking to combat the ills associated with retail alcohol sales might use taxes, direct regulation, or enforcement to change retailers' and consumers' behavior; duration of residency is not even on the list of potential public-policy levers mainstream economics would consider.

As this Court has often recognized, the dormant Commerce Clause prohibits mere economic protectionism. Tennessee's residency requirements are nothing else, and thus this Court should affirm the decision of the Sixth Circuit.

ARGUMENT

Courts regularly employ public choice economics in assessing the validity of anticompetitive laws because it assists in identifying the purposes and consequences of economic regulation. *See, e.g.*, *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285 (2d Cir. 2015) (citing an amicus brief on public choice theory); *Campion, Barrow & Assocs. v. City of Springfield*, 559 F.3d 765, 771 (7th Cir. 2009) (recognizing public choice theory as a tool for explaining collective decision-making); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 762 n.16 (5th Cir. 2001) (identifying public choice theory to explain government behavior); *Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan*, 370 P.3d 1170, 1193 (2016) ("Simply put, incentives matter. And not just in the private marketplace. Public choice

theorists have shown that 'political decision makers behave just like consumers and businesses.'").

This *amicus* brief describes how public choice economics works and then applies it to the circumstances of this case. It helps to explain why and how special interest groups, such as the Petitioner here, lobby government for legislation like Tennessee's durational-residency requirements for obtaining and renewing a retail license to sell alcohol that stifle competition. Indeed, basic economics confirms that the Tennessee statute serves no purpose other than to protect an entrenched and politically powerful industry. In short, economic analysis confirms that Tennessee's residency requirements are exactly the kind of protectionist measure that the dormant Commerce Clause forbids. And it predicts that a decision upholding that requirement and sanctioning facial discrimination against out-of-state businesses would have serious negative consequences for the national economy.

I. Public Choice Economics Analyzes How Special Interest Groups Act To Advance Their Own Interests

The premise of public choice economics is that rational actors generally act to advance their own self-interests—hardly a startling proposition. Economists have studied for years how this human imperative operates in the context of economic regulations. And their research confirms that economic regulation frequently reflects the influence of politically powerful interest groups acting to advance their own self-interests, not the interests of the general public. Public

choice thus provides a rigorous scientific explanation as to why many statutes and regulations are enacted, notwithstanding a lack of majority support from the public at large. Indeed, one core finding of public choice analysis is that the overwhelming majority of the public is completely ignorant of the details of most laws and regulations that are enacted.

Public choice economics is, in a nutshell, "the economic study of nonmarket decision making, or simply the application of economics to political science." Dennis C. Mueller, *Public Choice III* at 1 (2003); *see also* John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 Antitrust L.J. 1075 (2005) ("[T]he school of thought known as 'public choice'...holds that governmental entities, like private firms, will act in their economic self-interest."). It provides the best explanation for the enactment and employment of economic regulation. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 268 (1986) ("The [public choice] theory is now almost universally accepted among economists."). And what it teaches "is that politicians and constituents are rational economic actors. As such, constituents demand favorable regulation and politicians use the state's coercive power to supply it in return for political support." James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091, 1100 (2005).

For around half a century, economists have studied why economic regulation often serves principally to

protect special interests. What they found is that, "[a]lthough regulation sometimes is needed to correct a market failure, it also can be used to restrict competition in order to transfer wealth from consumers to a favored industry." *Id.* at 1099–100. Often, these provisions take the form of economic regulations. There are powerful economic incentives for cohesive interest groups, such as members of a trade or industry, to employ regulation to erect barriers to entry into its market. Indeed, not only did James Buchanan win the 1986 Nobel Prize in Economics for his work in public choice economics, but at least a dozen recipients of that prestigious prize have contributed to the study of the field. Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* ix (1st ed. 2009).

The concern that interest groups—what the Framers called "factions"—might coopt government for their own selfish ends, however, dates to the Constitution itself. *See The Federalist No. 10* (James Madison). Indeed, the Framers were particularly concerned about the undue influence of interest groups on the local level and their tendency to lobby for barriers against interstate commerce. *Id.*

The practice of lobbying government actors for anticompetitive regulations that will restrict competition and raise prices above what would be charged in otherwise open markets is known as "rent seeking." James M. Buchanan, *Rent Seeking and Profit Seeking*, in *Toward a Theory of the Rent-Seeking Society* 7–8 (James M. Buchanan et al. eds., 1980). This term is derived from the concept of "rent," which is "that part of the payment to an owner of resources over and

above that which those resources could command in any alternative use," or "receipt in excess of opportunity cost." *Id.* at 3. The result of rent seeking is unnecessary economic regulation that creates barriers to entry into a certain market, which invariably results in higher prices and lower production, both to the detriment of consumers.

Yet consumers rarely protest rent seeking by concentrated or well-organized industries, because the harm to consumers is diffuse. Each facing only small cost increases as a result of protectionist legislation, individual consumers have little incentive to push back against protectionism or even inform themselves of the details. By contrast, individual members of an industry each have a large financial incentive to invest in seeking protectionist regulation that guarantees them above-market rents. Then there is the cost of organizing. Put simply, "small groups with similar interests—like members of a particular industry—can organize political support more effectively than large diffuse groups—like consumers generally...[and the] outcome of the political process is likely to be regulation that harms consumers by protecting a favored industry from competition." Cooper, *supra*, at 1101.

Despite the harm to consumers, government actors often side with industry over consumers in enacting restraints on trade. Public choice economics provides an explanation: government actors too are rational actors, motivated to advance their own self-interest. If a government actor "could confidently await reelection whenever he voted against an economic policy that injured the society, he would assuredly do so"—that is, vote against an economic policy that injures society—

but this does not happen because "[i]f the representative denies ten large industries their special subsidies of money or governmental power, they will dedicate themselves to the election of a more complaisant successor." George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ & Mgmt. Sci. 5, 11 (1971). In this respect, "[t]he [political] system is calculated to implement all strongly felt preferences of majorities and many strongly felt preferences of minorities but to disregard the lesser preferences of majorities and minorities." *Id.* at 12. In other words, quite often consumers lose out to well-organized special interests.

II. Tennessee's Residency Requirements Benefit Incumbent Retailers at the Expense of Consumers and Competitors

From the perspective of public choice economics, there is no question but that Tennessee's durational residency requirements for liquor retailers are rent-seeking legislation that protects in-state economic interests—entrenched local retailers—at the expense of consumers and competitors. Tennessee's statute provides that an individual cannot obtain a retail license to sell alcohol unless that individual has "been a bona fide resident of this state during the two-year period immediately preceding the" application for a retail license. Tenn. Code Ann. § 57-3-204(b)(2)(A). The same requirement applies to corporations attempting to obtain a retail license. *Id.* § 57-3-204(b)(3)(A). Moreover, all owners, directors, and shareholders of a corporation must satisfy Tennessee residency requirements as well, effectively prohibiting out-of-state retailers from opening branches in Tennessee. *Id.* Residency

requirements for renewal applications discriminate on behalf of Tennessee residents to an even greater extent, imposing a ten-year residency requirement for renewals. *Id.* § 57-3204(b)(2)(A). In short, the statute by definition prohibits out-of-state retailors from obtaining licenses to sell alcohol, and thus excludes out-of-state retailers from competing in Tennessee's retail market for alcoholic beverages.

These provisions bear all the hallmarks of rent-seeking legislation intended to transfer wealth from consumers to an entrenched special interest. In so doing, the statute produces exactly what the dormant Commerce Clause prohibits: interstate trade barriers that create "economic isolation or jeopardize[] the welfare of the Nation as a whole, as it would do if [states] were free to place burdens on the flow of commerce across its borders." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995); *see also Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (explaining that the Framers believed that the dormant Commerce Clause was crucial for "avoid[ing] the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

A. Tennessee's Durational Residency Requirements Are a Classic Example of Rent-Seeking Law

Rent-seeking statutes and regulations typically possess two common characteristics: a concentrated or well-organized special interest that will enjoy the benefit of the restriction and dispersed consumer interests that will bear the resulting burden. *See* Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 Chi.-Kent L. Rev. 165, 171 (2018); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 3 (1971) ("In the sharing of the costs of efforts to achieve a common goal in small groups, there is however a surprising tendency for the 'exploitation' of the great by the small.").

Tennessee's durational residency requirements embody both of these characteristics. To begin with, the requirements' chief advocate—indeed, the sole advocate, given the state's refusal to defend them—is the Petitioner, Tennessee Wine & Spirits Retailers Association. It is the very archetype of an entrenched and well-organized special interest, "represent[ing] more than 500 liquor store owners across Tennessee," so as to present (in its words) "a powerful, cohesive stand that legislators and regulators cannot ignore." *See About TWSRA*, Tennessee Wine & Spirits Retailers Association;[3] *see also* J.A.11. It advocates to advance one thing and one thing only: the commercial interests of those 600 or so alcohol retailers.

---

[3] *Available at* http://www.twsra.com/content/about-twsra.

By contrast, that public interest is quite diffuse. Tennessee's population is 6.7 million. *Quick Facts: Tennessee*, U.S. Census Bureau.[4] Around 46.3 percent of Tennessee's population has consumed at least one alcoholic beverage within the past 30 days. *Tennessee: Alcohol Consumption*, Center for Disease Control.[5] So roughly three million Tennesseans regularly consume alcoholic beverages, versus the 600 or so retailers who sell them. And, of course, the market for alcohol sold in Tennessee is not limited to the state's population, with tourist attractions in the Nashville area drawing nearly 15 million visitors in 2017[6] and the major metropolitan area surrounding Memphis encompassing three states. Moreover, the owners and employees of out-of-state businesses that might want to enter the Tennessee market are not even eligible to vote in the state.

So it is little surprise that the bloc of 600 or so retailers was able to band together to lobby successfully to exclude out-of-state retailers from setting up shop, competing against them, and driving down prices. The benefit to those retailers individually and as a group is great, while the cost to individual consumers is small, reducing their incentive to organize. And that is why Tennessee's anticompetitive law is unlikely to be overturned through legislation. *See generally* Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* (1st ed.

---

[4] *Available at* https://www.census.gov/quickfacts/tn.

[5] *Available at* https://www.cdc.gov/brfss/brfssprevalence/.

[6] *Available at* https://www.tennessean.com/story/money/2018/01/25/nashville-area-set-new-record-tourism-14-5-million-visitors-2017/1065628001/.

2009). After all, the same incentives that influenced the political process to enact such a protectionist law still prevail.

In sum, from an economic viewpoint, the effect of Tennessee's durational residency requirements for a retail liquor license is the transfer of wealth from a large group of consumers to a small group of long-time in-state retailers—a classic example of rent-seeking legislation. Public choice economics suggests that Tennessee's residency requirements are far more reflective of the interests of retailers than those of the much larger group of consumers.

B. Tennessee's Durational Residency Requirements Raise Prices for Consumers, Confirming Their Rent-Seeking Nature

The functioning of Tennessee's residency requirements confirms their rent-seeking nature and impermissibly discriminatory purpose. The Court has repeatedly held that a state law or regulation discriminating against out-of-state interests will be struck down absent concrete evidence to justify it. *See Granholm v. Heald*, 544 U.S. 460, 490 (2005). "[T]his Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976). "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Bacchus Imports, Ltd. v.*

Dias, 468 U.S. 263, 276 (1984). The fact that the good in question is alcohol does not fundamentally change the dormant Commerce Clause inquiry, especially when it comes to the anti-discrimination requirements of the Constitution. *See* Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & Liberty 609 (2005).

Price effects can and should inform that inquiry. Indeed, the Court has long considered impact on price in evaluating whether a restriction is impermissibly discriminatory in violation of the dormant Commerce Clause. *See, e.g.*, *Best v. Maxwell*, 311 U.S. 454 (1940); *Bacchus*, 468 U.S. at 263; *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994)). As the Court's precedents implicitly recognize, "direct assessment of price effects can help reveal whether a purportedly discriminatory law actually alters marketplace outcomes." Jerry Ellig & Alan E. Wiseman, *Price Effects and the Commerce Clause: The Case of State Wine Shipping Laws*, 10 J. Empirical Legal Stud. 196, 197 (2013) [hereinafter "Ellig & Wiseman 2013"].

In this regard, state statutes that facially discriminate against out-of-state retailers also have discriminatory effects in practice, in the form of higher prices for consumers. The presence of that price effect, in turn, confirms that a statute's purpose is not benign, but discriminatory: "we can be more confident that state laws that appear to be discriminatory on their face also have discriminatory effects in practice; they exclude competitors who really could capture market share by offering consumers a better deal." *Id.* at 202.

In a 2013 article in the *Journal of Empirical Legal Studies*, economists Jerry Ellig and Alan Wiseman analyzed two types of state statutes: "restrictions on the size of wineries that may ship directly to consumers, and laws that permit out-of-state wineries, but not out-of-state retailers, to ship alcohol directly to consumers." *Id.* at 197. Their focus was Virginia's ban on direct shipment, which was ultimately repealed, and thus data existed from both before and after the repeal.

They found that "excluding retailers from direct shipment deprives consumers of access to substantial online price savings...because wineries' online prices plus shipping costs usually exceed those of the bricks-and-mortar stores" and that "combin[ing] production caps with exclusion of retailers...are the most restrictive of all" and "ultimately deprive[s] consumers of access to lower prices online." *Id.* at 222. Even beyond the harm to consumers from increased prices, state restrictions on interstate trade in wine also hurt consumers by reducing variety. The study "confirm[ed] what intuition suggests: it is not physically possible for a retailer to stock every wine a consumer might want to buy, even from a sample of top-selling wines. E-commerce thus expands the product variety available to consumers." Jerry Ellig & Alan E. Wiseman, *The Economics of Direct Wine Shipping*, 3 J.L. Econ. & Pol'y 255, 271 (2007) [hereinafter "Ellig & Wiseman 2007"]. Thus, the cumulative effect of Virginia's anti-competitive law was increased costs and reduced choices.

Notably, the study found that state bans on direct wine shipment from wineries to consumers exist primarily to protect the economic interests of certain special interest groups. As it observed, "the creation of various restrictions on interstate alcohol trade has often been marked by substantial lobbying activity by those who stood to benefit from such laws." Ellig & Wiseman 2013, *supra*, at 222.

Unsurprisingly, the economic consequences of these kinds of anticompetitive statutes fall on consumers. *See* Ellig & Wiseman 2007, *supra*, at 263 (observing that a state's "prohibition of interstate direct shipment deprived consumers of access to noticeable and statistically significant price savings."); Alan E. Wiseman & Jerry Ellig, *The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause*, 69 J. Politics 859, 872 (2007) (finding that, in Northern Virginia, "[f]ollowing the legalization of direct shipment, the online-offline price differential decreased nearly 40% between 2002 and 2004"). And these are not small. A 2001 analysis found that "American consumers pay a minimum of $15 billion more annually for goods and services as a result of such e-commerce protectionism." *See* Robert D. Atkinson, *Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting Consumers*, Progressive Policy Institute (Jan. 26, 2001).

One can reasonably extrapolate that the principal effect of Tennessee's durational residency requirements, which effectively bar out-of-state retailers, is to increase prices for consumers and thus to create rents for in-state retailers. And that, in turn, confirms the statute's actual purpose: protectionism.

C. Tennessee's Durational Residency Requirements Advance No Legitimate Local Purpose

There is no countervailing benefit of statutes like Tennessee's, as compared to non-discriminatory means the state might have employed to achieve its avowed purposes. And that is fatal, because it is the state's burden to demonstrate that discriminatory legislation like Tennessee's "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489.

Tennessee's durational residency requirements fail to serve the claimed purposes for which they were enacted: "to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises." Tenn. Code Ann. § 57-3-204(b)(4). In particular, the State and Petitioner cite the risks of drunk driving, domestic abuse, and underage drinking. Pet.App.50a. Those risks, the Petitioner argues, are addressed by the durational residency requirements because in-state retailers are "closest to the local risks" and "will be knowledgeable about the community's needs and committed to its welfare." Pet. Br. 49.

But this rationale fails as a matter of both economic logic and simple common sense. From the economic viewpoint, a state that seeks, for example, to reduce sales to underage consumers would naturally seek to alter incentives to that end. The law recognizes that

economic incentives are the way that government influences behavior, given that "our legal system is in large parts premised upon the notion that as the cost associated with a particular type of behavior increases, the quantity of such behavior will decrease." *Smith v. Nat'l Transp. Safety Bd.*, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (citing Richard A. Posner, *Economic Analysis of Law* 5 (4th ed. 1992)); *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1724 (2017) (recognizing that Congress can use "economic and legal incentives" to encourage "good behavior"); *Northwest Airlines, Inc. v. Wis. Dep't of Revenue*, 717 N.W.2d 280, 285 n.7 (Wis. 2006) (explaining that states can "use[] financial incentives to induce desirable behavior.").

For example, a state seriously seeking to reduce alcohol consumption across the board would first turn to taxation. Raising taxes, as compared to a convoluted durational residency requirement, is much more likely to do the trick, because with a "tax in place, people will typically buy less of a good—or partake in less of an activity—than they would in the absence of the tax." Joseph J. Minarik, *Taxation, A Preface*, in *The Concise Encyclopedia of Economics* (1st ed. 1993).[7] As for the residency requirement, any reduction in consumption is just a side effect.

Likewise, a state seriously seeking to address underage drinking would first turn to age-related regulation and enforcement. Indeed, states typically fine and otherwise penalize retailers that sell alcohol to

---

[7] *Available at* http://www.econlib.org/library/Enc1/TaxationAPreface.html.

underage or inebriated consumers, and that incentivizes retailers to prevent such sales, so as to avoid the cost of punishment. *See, e.g.*, Cal. Civ. Proc. Code § 1218; Conn. Gen. Stat. § 51-33; N.Y. Judiciary Law § 753; Tenn. Code Ann. § 29-9-103; Tex. Gov't Code § 21.002; Va. Code Ann. § 18.2-457 (providing for fines). Going beyond bare regulation, stepped-up enforcement further increases the expected cost of such conduct to retailers, spurring them to adopt policies such as universal identification checks and improved training for retail staff.

A durational residency requirement, by contrast, does not alter marginal incentives at all. It does not, for example, increase the expected cost to the retailer of selling alcohol to an underage or inebriated consumer.[8] Instead, as the court below put it, the Tennessee law here "do[es] not relate to the flow of alcoholic beverages within the state," but only "the flow of individuals who can and cannot engage in economic activities." Pet.App.27a. Because it has basically no impact on incentives, it would be expected to have no impact on behavior. It is orthogonal to addressing the ills identified by the State and the Petitioner.

In short, this is not a case where "the principles underlying the Twenty-first Amendment are sufficiently

---

[8] *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 170 (1968) (arguing that criminal activity can be deterred through economic incentives); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. Crim. L. & Criminology 765, 766 (2010) ("[T]hat sanction threats can deter crime is at the very heart of the criminal justice system").

implicated...to outweigh the Commerce Clause principles that would otherwise be offended" by a protectionist measure. Instead, Tennessee's durational residency requirement, like the "in-state presence requirement" in *Granholm*, "runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" 544 U.S. at 475.

III. Upholding Tennessee's Durational Residency Requirements Would Open the Door to Anti-Consumer Rent-Seeking on a Massive Scale

Public choice economics not only informs as to the nature of Tennessee's protectionist residency measure but also predicts the fury of anti-competitive legislation that would be unleashed by a decision upholding it. Such a decision would undermine the integrated national economy that the dormant Commerce Clause protects by incentivizing actors in other states to lobby for and achieve the enactment of a raft of similarly protectionist policies.

The key to the Petitioner's argument is to tie the trade restriction at issue here—durational residency requirements—to Tennessee's three-tier system, despite that the restriction is far from integral to it. *See, e.g.*, Pet. Br. 45–46. But potentially any type of competitor-based restriction could be tied in the same manner to a three-tier system, based on the same rationale proffered by the State and Petitioner here, the need to "to maintain a higher degree of oversight, control and accountability" over those involved in the al-

cohol trade. Tenn. Code Ann. § 57-3-204(b)(4). For example, although *Granholm* barred discrimination against out-of-state wine *shipments*, the Petitioner's argument would permit a state to achieve the same result by regulating out-of-state wine *shippers*—after all, what do they know about "the community's needs"? *See* Pet. Br. 22.

The consequences of a decision upholding Tennessee's attempt to circumvent *Granholm* and the Court's other dormant Commerce Clause precedents are all too predictable. Public choice economics predicts that, freed from the limitation of the dormant Commerce Clause, alcohol wholesalers and retailers will pursue their financial interests by lobbying for restraints on interstate trade in alcohol. And it predicts that they are likely to succeed, based on the same kind of interest-group politics that spurred Tennessee legislators to enact that state's discriminatory durational residency restrictions. There may be no more powerful lobby at the state level. *See* Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, 27 Reg., No.3, at 30 (2004) (finding that, with respect to alcohol shipments, consumer interests predominate in no states).

In fact, that is exactly what happened following this Court's decision in *Granholm*, even though it enforced the dormant Commerce Clause to strike down a barrier to interstate trade. Just two years after the decision, Federal Trade Commission officials surveyed states' legislative responses. Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 Antitrust L.J.

505 (2008). What they found was that states contrived a variety of schemes to evade this Court's holding and restrict interstate trade, such as on-site purchase requirements and production limitations. *Id.* at 513–16. These are precisely the kinds of restrictions that empirical research has shown deprive consumers of access to lower prices. Ellig & Wiseman 2013, *supra*, at 197–98. Although avoiding facial discrimination, these states managed to "effectively make direct shipping by out-of-state wineries economically impossible." Ohlhausen & Luib, *supra*, at 506. The cause? Interest-group politics pitting a concentrated, organized industry against the diffuse public interest. Thus, their conclusion: "A Commerce Clause challenge may be the only practical way to attack these restrictions and protect the interests of producers and consumers in enjoying the benefits of a competitive, national market." *Id.*

And that was what happened in the wake of a decision *enforcing* the dormant Commerce Clause! A decision declining to do so, and sanctioning facial discrimination against out-of-state retailers, would open the floodgates to all manner of restriction, limited only by the creativity of state trade associations like the Petitioner and their legislative allies. That would be a blow to interstate trade in alcoholic beverages, to the national market, and ultimately to consumers.

CONCLUSION

The Court should affirm the judgment of the court below.

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RENEE M. KNUDSEN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

DECEMBER 2018

No. 18-96

In the
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT AFFLUERE INVESTMENTS, INC.

JEREMY M. BYLUND
Counsel of Record
MARISA C. MALECK
GABRIEL KRIMM*
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
mmaleck@kslaw.com
(202) 737-0500

*Admitted only in Tennessee. Practice supervised by principals of the Firm.

Counsel for Amici Curiae

December 20, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Fourteenth Amendment's Privileges Or Immunities Clause Protects The Fundamental Rights Of United States Citizenship. 5

II. The Fundamental Rights of United States Citizenship Include All Rights Of Contract And Property Guaranteed To Citizens Under State Law. 14

III. Tennessee Law Violates The Privileges Or Immunities Clause By Denying New Residents Contract And Property Rights Afforded To Other State Citizens. 18

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Byrd v. Tenn. Wine & Retailers Ass'n,
883 F.3d 608 (6th Cir. 2018) 3

Corfield v. Coryell,
6 F. Cas. 546 (C.C.E.D. Pa. 1825) ..... *passim*

District of Columbia v. Heller,
554 U.S. 570 (2008) 14

Dred Scott v. Sanford,
60 U.S. (19 How.) 393 (1857) 6

Esquivel-Quintana v. Sessions,
137 S. Ct. 1562 (2017) 7

Lucia v. SEC,
138 S. Ct. 2044 (2018) 4, 5

McDonald v. City of Chicago,
561 U.S. 742 (2010) ..... *passim*

Moore v. Illinois,
55 U.S. (14 How.) 13 (1852) 5

Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833 (1992) 22

Ross v. Crow,
68 Tenn. 420 (1877) 18

Saenz v. Roe,
526 U.S. 489 (1999) ..... *passim*

Slaughter-House Cases,
83 U.S. (16 Wall.) 36 (1872) 21

Whole Women's Health v. Hellerstadt,
136 S. Ct. 2292 (2016) 20

STATUTES

Civil Rights Act of 1866, ch. 31, 14 Stat. 27 17

Tenn. Code Ann. § 57-3-204 ..... 3, 18, 19

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 2 20

U.S. Const. art. I, § 10 9

U.S. Const. art. II, § 1 ..... 5, 20

U.S. Const. art. IV, § 2 9

U.S. Const. art. IV, § 4 13

U.S. Const. amend. XIV, § 1 ..... 6, 7, 22

U.S. Const. amend. XV 21

U.S. Const. amend. XIX 21

LEGISLATIVE MATERIAL

Cong. Globe, 39th Cong., 1st Sess. (1866) ..... *passim*

The Declaration of Independence (U.S. 1776) 8

Report of the Joint Committee on
Reconstruction (1866) 16

OTHER AUTHORITIES

Akhil Reed Amar,
Substance and Method in the Year 2000,
28 Pepp. L. Rev. 601 (2001) 8

Akhil Reed Amar,
The Bill of Rights (1998) 8, 10, 11

Richard L. Aynes,
Ink Blot Or Not: The Meaning of Privileges and/or Immunities,
11 U. Pa. J. Const. L. 1295 (2009) 8, 9

Jack M. Balkin & Sanford Levinson,
Thirteen Ways of Looking at Dred Scott,
82 Chi.-Kent L. Rev. 49 (2007) 6, 10

James E. Bond,
No Easy Walk to Freedom (1997) ..... *passim*

Robert J. Cottrol,
Reconstruction Amendment Historiography: The Quest for Racial and Intellectual Maturity,
23 Rutgers L.J. 249 (1992) 6, 16

Robert J. Cottrol & Raymond T. Diamond,
The Second Amendment: Toward an Afro-Americanist Reconsideration,
80 Geo. L.J. 309 (1991) 15

Michael Kent Curtis,
Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States,
78 N.C. L. Rev. 1071 (2000) 7, 11

Michael Kent Curtis,
No State Shall Abridge (1986) 12

Michael Kent Curtis,
Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner*: Individual Rights and the Fourteenth Amendment*,
38 B.C. L. Rev. 1 (1996) 15, 16

James W. Ely, Jr.,
Buchanan and the Right to Acquire Property,
48 Cumb. L. Rev. 423 (2018) 11

Richard A. Epstein,
Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment,
1 N.Y.U. J. L. & Liberty 1096 (2005) 22

Richard A. Epstein,
Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment,
1 N.Y.U. J. L. & Liberty 334 (2005) 22

Eric Foner, *Reconstruction*
(Updated ed. 2014) 14, 15, 16

Christopher R. Green,
The Original Sense of the (Equal) Protection Clause: Pre-Enactment History,
19 Geo. Mason U. Civ. Rts. L.J. 1 (2008) 16, 17

Christopher R. Green,
The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application,
19 Geo. Mason U. Civ. Rights L.J. 219 (2009) ... 17

Richard White,
The Republic for Which It Stands
(2017) 5, 14, 15, 16

Rebecca E. Zietlow,
The Rights of Citizenship: Two Framers, Two Amendments,
11 U. Pa. J. Const. L. 1269 (2009) 7, 17

INTEREST OF *AMICI CURIAE*[*]

Amici curiae are law professors and experts in the field of constitutional law. Each has published works commenting on the Fourteenth Amendment and the Privileges or Immunities Clause specifically.

Amici submit this brief to elucidate the original public meaning of the Fourteenth Amendment's Privileges or Immunities Clause. Read in light of that meaning, the Clause prohibits states from circumscribing the property and contract rights of United States citizens based on duration of state residency. *Amici* urge this Court to apply the Privileges or Immunities Clause according to its original meaning and invalidate the Tennessee residency requirements at issue in this case.

The signatories to the brief are as follows:

Professor Emeritus Richard L. Aynes, The University of Akron School of Law.

Professor James W. Ely, Jr., Vanderbilt University Law School.

Professor Richard A. Epstein, New York University School of Law.

Professor Christopher R. Green, The University of Mississippi School of Law.

---

[*] Petitioner's and respondents' letters giving blanket consent to amicus briefs are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

Professor Ilya Somin, Scalia Law School – George Mason University.

Professor Rebecca E. Zietlow, The University of Toledo College of Law.

SUMMARY OF ARGUMENT

This case concerns whether a State may forbid United States citizens from plying a lawful trade based purely on the duration of their in-state residency. Tennessee law permits the retail sale of alcohol by anyone holding a state-issued retailer's license. *See* Tenn. Code Ann. § 57-3-204. But the law restricts both the grant and renewal of such licenses based on the duration of an applicant's Tennessee residency. *See id.* §§ 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D). The Sixth Circuit held that those restrictions violate the negative (also known as the dormant) Commerce Clause and severed them from the rest of the statute. *See Byrd v. Tenn. Wine & Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018). The court did not reach the separate issue of whether the duration-of-residency provisions *also* violate the *Privileges or Immunities Clause* of the Fourteenth Amendment.

Unfortunately, "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of [this Court's] Fourteenth Amendment jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (THOMAS, J., dissenting). As originally understood, the Privileges or Immunities Clause prohibits the duration-of-residency provisions at issue in this case. *Amici* submit this brief to explain why the Court can affirm the Sixth Circuit on that distinct and "more straightforward" basis. *McDonald v. City of Chicago*, 561 U.S. 742, 820 (2010) (THOMAS, J., concurring in part and concurring the in judgment).

The "original public meaning" of the Privileges or Immunities Clause should direct this Court's judicial decisionmaking. *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (THOMAS, J., concurring). The Clause protects those "*fundamental* rights that belong to all citizens of the United States." *Saenz*, 526 U.S. at 526 (THOMAS, J.). Under our federal system, that order of rights doubtless includes all state-recognized *civil* rights necessary for "the enjoyment of life and liberty," including rights "to acquire and possess property" consistent with local law. *McDonald*, 561 U.S. at 820 (Thomas, J.) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825)). The Privileges or Immunities Clause thus requires that each State extend to *all* United States citizens the *same* contract and property rights enjoyed by citizens generally under state law, irrespective of residency duration.

As United States citizens who have recently moved to Tennessee, Douglas and Mary Ketchum are entitled to the protections of the Privileges or Immunities Clause. Were Tennessee to deny the Ketchums an alcohol retailer's license solely on duration-of-residency grounds, it would be stripping them of contract and property rights afforded to other Tennesseans. Such an act would clearly abridge the Ketchums' fundamental rights as United States citizens and, in so doing, would violate the Privileges or Immunities Clause.

ARGUMENT

I. The Fourteenth Amendment's Privileges Or Immunities Clause Protects The Fundamental Rights Of United States Citizenship.

Provisions of the Constitution must be interpreted by reference to their original public meaning. *E.g.*, *Lucia*, 138 S. Ct. at 2056 (THOMAS, J., concurring). Read according to its original public meaning, the Privileges or Immunities Clause prohibits states from abridging the *fundamental rights* of United States citizenship.

Prior to the Civil War, citizenship was primarily a local, rather than a national, concern. *See* Richard White, *The Republic for Which It Stands* 59 (2017); James E. Bond, *No Easy Walk to Freedom* 216 (1997). To be sure, a person could be a "Citizen of the United States." *See* U.S. Const. art. II, § 1, cl. 5. But antebellum Americans considered "the United States" a plural collective, rather than a fully cohesive whole. People "commonly said ... 'the United States *are*," instead of the now-common "is." White, *supra*, at xvii. Consistent with this understanding, one achieved *national* citizenship only through *local* citizenship—that is, by birthright or naturalization in one of the states or territories. *Cf. Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) ("Every citizen of the United States is also a citizen of a State or territory.").

With the adoption of the Fourteenth Amendment, however, the reverse became true. The Amendment's first sentence declared that "[a]ll persons born or naturalized in the United States ... are citizens of the

United States and of the State wherein they reside." *See* U.S. Const. amend. XIV, § 1. This provision "significantly altered our system of government" by binding the states to respect all *national* citizens within their borders. *McDonald*, 561 U.S. at 807 (THOMAS, J.).

Never had that shift been more necessary. Though the Thirteenth Amendment had formally abolished slavery, it had not explicitly recognized freedpeople as members of the body politic. Another amendment was necessary to overrule "[p]erhaps the most fundamental holding" of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), "that 'blacks' were not 'African-Americans'—they were persons of African descent who lived in America, but they could never truly be called Americans." Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 Chi.-Kent L. Rev. 49, 55 (2007). That opinion had "used citizenship as the central dividing line between those who possess basic rights and those who did not." *Id.* at 56. Accordingly, the Fourteenth Amendment "unambiguously overruled" *Dred Scott* and "recognize[d] black Americans as" citizens of the United States. *McDonald*, 561 U.S. at 807–08 (THOMAS, J.).

That citizenship meant very little, however, unless it worked as a shield against the "nearly absolute" authority states still exercised over their inhabitants. Robert J. Cottrol, *Reconstruction Amendment Historiography: The Quest for Racial and Intellectual Maturity*, 23 Rutgers L.J. 249, 252 (1992). The abolition of slavery notwithstanding, the states retained the myriad residual powers not delegated to

the national government, *see* U.S. Const. amend. X, allowing them to control most of the critical matters of everyday life. The Union's victory in the war thus required a "Second Founding" to revise antebellum federalism. Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. Pa. J. Const. L. 1269, 1270 (2009).

As part of that project, the Fourteenth Amendment's second sentence gave meaning to national citizenship by protecting its "privileges" and "immunities" from state abridgement. U.S. Const. amend. XIV, § 1. Although the text does not identify those privileges and immunities explicitly, the phrase was never the enigma some have made it out to be. *See* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1074 (2000). By careful review of the text, context, and history of the Privileges or Immunities Clause, this Court can discern and apply that meaning. All three of those guides show that, in prohibiting state abridgment of the "privileges or immunities" of national citizens, the Privileges or Immunities Clause bound the states to respect certain *fundamental* rights.

The Court should "begin, as always, with the text." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (THOMAS, J.). Though less commonplace now, nineteenth-century readers would have understood the words "privileges" and "immunities" to simply mean "rights." *See, e.g.*, Akhil Reed Amar, *The Bill of Rights* 165–69 (1998); Curtis, *Historical Linguistics*, *supra*, at 1094–1138; *see generally*

McDonald, 561 U.S. at 813–22 (giving a full account of original public meaning). And "these were not simply lawyers' terms." Richard L. Aynes, *Ink Blot Or Not: The Meaning of Privileges and/or Immunities*, 11 U. Pa. J. Const. L. 1295, 1298 (2009). Indeed, they were "part of the public understanding of the era." *Id.* Thus, in the eyes of the public at the time of enactment, the Clause quite literally guaranteed "United States citizens a certain collection of rights ... attributable to that status." *McDonald*, 561 U.S. at 808 (THOMAS, J.).

Of course, determining what specific rights fall into that collection requires a broader view of context and history. "Look[ing] to history" reveals that this practice of guaranteeing certain fundamental rights by law was in accord with deep-rooted Anglo-American legal tradition. *Saenz*, 526 U.S. at 522 (THOMAS, J.). According to that tradition, government existed primarily—if not exclusively—to preserve certain natural and inalienable rights. *See, e.g.*, The Declaration of Independence para. 2 (U.S. 1776). In safeguarding those rights and their necessary components *legally*, free governments solidified the "'privileges' or 'immunities' of citizenship." *Mcdonald*, 561 U.S. at 815 (THOMAS, J.); *see* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 632 (2001); *Bond*, *supra*, at 256. A reference to the "privileges and immunities of citizenship" thus connoted not only basic protections of "life, liberty, and the pursuit of happiness," but also the "facilitators" of such rights, including enforcement of property and contract interests. *See* Bond, *supra*, at 255.

By the 1860s, Americans had long been securing such privileges and immunities through written constitutions—whether colonial, state, or national. *See Saenz*, 526 U.S. at 522–24 & nn.2–3 (THOMAS, J.). Read against that textual and historical backdrop, the Fourteenth Amendment's reference to the "privileges" and "immunities" of national citizenship naturally refers to the fundamental rights secured through the nation's federal system of government. Those rights include not only the protections against government power contained in the Bill of Rights, but also the vast reservoir of state-secured citizenship rights guaranteed through the Constitution's establishment of the federal structure. *See* U.S. Const. art. I, § 10 (specific prohibitions on state power); *id.* art. IV, § 2, cl. 1 (guaranteeing interstate comity in the "privileges and immunities" of citizenship); *id.* § 4 (guaranteeing a "Republican Form of Government" in every state).

The drafters' decision to borrow language from the "Comity" Clause of Article IV further supports this view. This textual "link ... is not accidental." Aynes, *supra*, at 1299. Given the obvious similarities between the two provisions, "it can be assumed that the public's understanding of the [Privileges or Immunities Clause] was informed by its understanding of the [Comity Clause]." *McDonald*, 561 U.S. at 819 (Thomas, J.).

Importantly, the Constitution's original reference to the "privileges and immunities" of citizens had, by the 1860s, been "famously" interpreted to incorporate the traditional common law view of fundamental citizenship rights, which had always been enjoyed by the citizens of the several states. *Id.* (THOMAS, J.); *see*

Saenz, 526 U.S. at 524–26 & nn.4–6; Amar, *The Bill of Rights*, *supra*, at 176. Writing for his Circuit Court in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825), Justice Bushrod Washington had explained that Article IV demanded interstate comity in "those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and *which have, at all times, been enjoyed by the citizens of the several states which compose this Union*, from the time of their being free, independent, and sovereign." 6 F. Cas. at 551 (emphasis added). Though too "tedious" to list, those rights included at least "the enjoyment of life and liberty," consistent with local law, as well as the rights needed to "take, hold and dispose of property." *Id.* at 551–52. So prevalent was the *Corfield* opinion that "[w]hen Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed" to Justice Washington's understanding of the privileges and immunities of citizenship. *Saenz*, 526 U.S. at 526 (THOMAS, J., dissenting). Indeed, they argued "that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified." *Id.*

Importantly, the fundamental rights Justice Washington identified were not all *enumerated* in the Constitution. Though the text mentioned some of them directly, others were protected indirectly through guarantees of interstate comity and *intra*state republican government. *Cf.* Balkin & Levinson, *supra*, at 57 (explaining the fundamental rights view of the Comity Clause shared among the drafters of the Fourteenth Amendment). In fact,

"Justice Washington's enumerations of privileges was largely drawn from the declaration of rights in state constitutions of the Revolutionary era." James W. Ely, Jr., *Buchanan and the Right to Acquire Property*, 48 Cumb. L. Rev. 423, 429 (2018).

The contemporaneous debates confirm that the Clause acted as a bulwark to stop states from trampling over these fundamental rights of the newly freedpersons. Whether or not they indicate legislative *intent*, "[s]tatements by legislators can ... demonstrate the manner in which the public used or understood a particular word or phrase.'" *McDonald*, 561 U.S. at 828 (THOMAS, J.); *see also* Curtis, *Historical Linguistics*, *supra*, at 1146. This is especially true when evidence indicates "that those statements were disseminated to the public." *McDonald*, 561 U.S. at 828. With respect to the Privileges or Immunities Clause, a broad range of public debate shows widespread understanding that it prohibited states from encroaching on any fundamental right of citizenship. *See* Amar, *The Bill of Rights*, *supra*, at 226; *cf.* Curtis, *Historical Linguistics*, *supra*, at 1146.

To begin, two "particularly significant" congressional speeches—one from Representative John Bingham and the other from Senator Jacob Howard—adopt this interpretation. *McDonald*, 561 U.S. at 829 (Thomas, J.). Bingham sponsored the Amendment in the House of Representatives. *E.g.* Michael Kent Curtis, *No State Shall Abridge* 57 (1986). It is telling that his first draft hewed closely to the language of Article IV. *See* Cong. Globe, 39th Cong., 1st Sess. 1089, 1091 (1866). More telling, though, is Bingham's description of the privileges and

immunities referred to in Article IV as the privileges and immunities of citizens *of the United States*. *See id.* at 1089, 1093, 1095. Indeed, Bingham urged his colleagues that the Fourteenth Amendment would *perfect* the Constitution by "securing to all the citizens *in every State* all the *privileges and immunities of citizens*" generally. *Id.* at 1090. The Clause was therefore crucial—and distinct from the Comity Clause—because it prevented states from discriminating against *their own citizens* in the fundamental rights of citizenship. *See id.* at 1094.

Howard, who managed the final bill in the Senate, *see* Curtis, *No State Shall Abridge*, *supra*, at 91, described its ultimate wording in a similar way. Though the Clause had by then taken on a clearer reference to *national* citizenship, *see* Cong. Globe, *supra*, at 2764, Howard affirmed Bingham's earlier conception of the privileges and immunities inherent in that status. *See id.* at 2765; *cf. Corfield*, 6 F. Cas. at 551 (interpreting the language to refer to "fundamental" rights "which belong ... to the citizens of all free governments").

Moreover, in further defining that class of rights, Howard explicitly referred to the Bill of Rights and Justice Washington's opinion in *Corfield*. *See* Cong. Globe, *supra*, at 2764. Thus, Howard explained, "[t]he great object of the first section of this amendment is ... to restrain the power of the States and compel them at all times to respect these great *fundamental* guarantees." *Id.* at 2766 (emphasis added). As pertained to Reconstruction, this provision "protect[ed] the black man in his *fundamental rights as a citizen*," that is, "those *fundamental rights* lying

at the basis of all society." *Id.* (emphasis added). Indeed, Howard saw this as the very definition of "republican government," *id.*, which the Constitution guaranteed in every state, *see* U.S. Const. Art. IV, § 4.

Those outside of Congress adopted Bingham and Howard's views. In the Southern ratification debates specifically, representatives for and against the Amendment shared a common understanding that it would protect the "natural" and "inalienable" rights of free persons, Bond, *supra*, at 255, "and the civil rights necessary to their exercise," *id.* at 9. *See id.* at 54 (North Carolina), 136 (South Carolina), 199 (Arkansas), 224 (Texas). Indeed, "[t]he evidence is ... overwhelming that the privileges and immunities clause was ... understood to [reach] those civil rights which persons needed in order to protect and exercise their natural rights" of life, liberty, and the pursuit of happiness. Bond, *supra*, at 257. Those rights, contemporaries believed, constituted the core privileges and immunities of citizenship under the free government of the United States. *See id.* at 255.

Thus, the text, context, history, and contemporaneous debate all point to a singular conclusion: The Privileges or Immunities Clause protects the fundamental rights of United States citizenship from state government interference.

II. The Fundamental Rights of United States Citizenship Include All Rights Of Contract And Property Guaranteed To Citizens Under State Law.

The same textual, contextual, and historical clues just discussed further fix the rights of national citizenship to include *all* contract and property rights recognized under state law. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (looking to history to fix the parameters of the right to bear arms).

By the close of the Civil War, it had become apparent to the nation's leaders that true emancipation required abolition "not in form only, but in substance." Cong. Globe, *supra*, at 91; *see* Eric Foner, *Reconstruction* 251 (Updated ed. 2014). Accordingly, the new constitutional right to be free from slavery required complementary legal protections, Foner *supra*, at 29; *see also, e.g.*, Cong. Globe, *supra*, at 1094 ("Restore those States with a majority of rebels to political power, and ... the disenfranchised colored citizens will be utterly powerless."), necessitating nationwide establishment of a new *economic* freedom through basic civil rights. White, *supra*, at 60–61. In other words, the rights of freedpeople had to include "those rights essential for ... enter[ing] the world of contract, to compete on equal terms as free laborers." Foner, *supra*, at 244; *see* Cong. Globe, *supra*, at 588–89; White, *supra*, at 66; *see also* White, *supra*, at 57 ("As long as the Radicals emphasized the larger Republican goals of nationalism, free labor, and contract freedom, they could exert tremendous influence.").

Yet "the South was not prepared to accord ... general liberties to the newly emancipated black population." Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 343 (1991). Indeed, the Confederate fight against abolition had already morphed into a new, subtler *legal* effort to "maintain control over the former slaves." *Id.* at 344. Throughout the South, state governments enacted so-called "Black Codes," aiming "to stabilize the black work force and limit its economic options apart from plantation labor." Foner, *supra*, at 199. In the main, these laws limited or outright denied newly freed slaves' movement, as well as their contract and property rights. Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 31 (1996); *cf.* White, *supra*, at 81 ("What was developing in the South was a coercive labor system, which ... depended on extralegal violence, coercive laws, burdensome debt relations, and the use of convict labor to limit alternatives."). Contemporary observers noted that the Black Codes at once mandated employment, *see* Cong. Globe, *supra*, at 588–89, 1691, 1124, and imbued employers and state governments with the powers of slave master. In addition to punishing "vagrancy" by forced labor, the Codes restricted or outright denied the freedpeople's ability to travel, *id.* at 516, 651, buy or rent real estate, *id.* at 517, 589, 1838, buy and sell goods, *id.* at 517, 589, or otherwise engage in business, Bond, *supra*, at 3.

Although this was predominantly a Southern phenomenon, it was not confined there. "[M]any Northern states, though they banned slavery, had discriminated against free blacks." Curtis, *Resurrecting*, *supra*, at 32. Several Midwestern and Western states had even closed their borders to blacks entirely, fearing an impending migration. Foner, *supra* at 26.

Because states retained power over local matters of property and contract, undoing this system of de facto slavery required broad national restrictions on traditional state prerogatives. *See* Cottrol, *Reconstruction Amendment Historiography*, *supra*, at 252. Congress had thus proposed the Fourteenth Amendment, at least in part, as a *constitutional* enforcement of the Civil Rights Act of 1866. White, *supra*, at 73; *see* Report of the Joint Committee on Reconstruction 15 (1866).

Nowhere was that clearer than in the Privileges or Immunities Clause. Indeed, "the very notion of civil rights refers historically to the rights of citizens." Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. Civ. Rts. L.J. 1, 26 (2008). Thus, "[a] provision guaranteeing the privileges or immunities of citizens [was] ... a ... natural way to constitutionalize an act protecting civil rights." *Id.* At least those debating ratification understood it as such. Bond, *supra*, at 124; *see id.* at 57–58.

The Civil Rights Act thus provides a window into the sort of *state-based, civil rights* included in the fundamental rights of national citizenship. In fact, Representative "Bingham believed that the Act did

nothing more than ... state [those] rights." Zietlow, *supra*, at 1283. Importantly, the Act did so through a detailed list of specific protections, rather than by general reference. After granting freedpeople national citizenship in language similar to the Fourteenth Amendment, the Act preserved for "such citizens ... the same right, in every State and Territory in the United States, *to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.*" Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added).

This passage thus serves to spell out the implications of applying the Privileges or Immunities Clause to *intra*state citizenship rights. As free governments, the states all granted their citizens the civil rights necessary to preserve life, liberty, and property. *See Corfield*, 6 F. Cas. at 552. In granting these privileges and immunities of citizenship, the states now had to grant them to *all United States citizens equally*. *See* Civil Rights Act of 1866, § 1; *see generally* Green, *supra* (explaining that the Privileges or Immunities Clause, not the Equal Protection Clause, was originally understood as enforcing racial equality with regard to civil rights); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 Geo. Mason U. Civ. Rights L.J. 219 (2009) (same). Thus, just as the Constitution had always prohibited discrimination against the citizens of *other* states in the privileges and immunities of citizenship, the law now prohibited discrimination against any citizen of

the *United States* with regard to those fundamental civil rights.

In sum, the fundamental rights of national citizenship guaranteed by the Privileges or Immunities Clause include *at least* the full civil rights of property and contract protected under state law. *McDonald*, 561 U.S. at 834–35 (THOMAS, J.). These rights were indispensable to the freedpeople. Without them, they could not leave the plantation, reunite their families, and better their economic positions. And though the necessity of that guarantee is admittedly less extreme today, it still stands as an essential benefit of United States citizenship protected under the Fourteenth Amendment.

III. Tennessee Law Violates The Privileges Or Immunities Clause By Denying New Residents Contract And Property Rights Afforded To Other State Citizens.

The invalidity of the Tennessee licensing law inescapably follows from the above.

To begin, the law is, at bottom, a circumscription of certain basic contract and property rights. To complete a retail sale of an "alcoholic spirituous beverage[]," Tenn. Code Ann. § 57-3-204(a), is to execute a contract exchanging rights in personal property, *see, e.g.*, *Ross v. Crow*, 68 Tenn. 420, 420–21 (1877). Moreover, a host of other basic contract and property transactions feed into that ultimate sale. At the very least, a retailer must purchase or rent real estate and acquire and maintain inventory in order to facilitate sales. A retailer may also need to hire employees or independent contractors for ancillary

services. By requiring a retailer's license for alcohol sales, Tennessee has necessarily circumscribed this entire subset of contract and property rights.

More importantly, in denying the license to Tennesseans based on the *duration of their state residency*, the law abridges their fundamental rights as *United States* citizens. As explained above, the fundamental rights of United States citizenship include the right to enjoy local contract and property protections *in any State* as do other citizens *of that State*. The state law at issue here permits the sale of alcohol through a valid retailer's license. But an applicant is not even eligible to be *considered* for a license unless and until he establishes "bona fide residen[cy]" in Tennessee for "the *two-year* period immediately preceding" the date of application. *Id.* § 57-3-204(b)(2)(A) (emphasis added); *see id.* §§ 57-3-204(b)(3)(A)–(B), (D). To renew that same license, an applicant must have maintained Tennessee residency "for *at least ten ... consecutive years*." *Id.* (emphasis added); *see id.* §§ 57-3-204(b)(3)(A)–(B), (D).

The law's clear and explicit terms therefore separate citizens of the United States, as license applicants, into two distinct classes. Some—the preferred, established residents of Tennessee—can apply for an initial license forthwith and renew that license immediately upon its expiration. Others—disfavored newcomers like the Ketchums—must wait two years to apply for the initial license and eight more years for a right to renew. In restricting license eligibility based on residency duration, Tennessee law thus denies the basic rights of mobility and free labor

that the Reconstruction generation fought so nobly to secure.

Neither should that denial go uncorrected by virtue of the subject matter at hand. "A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment." *Whole Women's Health v. Hellerstadt*, 136 S. Ct. 2292, 2329–30 (2016) (THOMAS, J., dissenting). In this case, the duration-of-residency requirement infringes the constitutional right to enjoy state-recognized civil rights, full stop.

This is not to say that *all* duration-of-residency requirements violate the Privileges or Immunities Clause. Again, only those laws bearing on what *nineteenth century Americans* would have understood to constitute *fundamental rights of citizenship* fall within the Clause's ambit. Notably, that order does not include *political* rights—such as voting, holding office, and sitting on juries—which occupied a *separate rung* in the hierarchy of rights as understood by nineteenth-century Americans. Bond, *supra*, at 255–56. States had always discriminated among their own citizens with respect to political rights, most notably suffrage. And the Constitution itself denies citizens the right to hold office on the bases of age and residency. *See* U.S. Const. art. I, § 2, cl. 2; *id.* § 3, cl. 3.; *id.* art. II, § 1, cl. 5. Accordingly—and despite warning from detractors that the Privileges or Immunities Clause was sufficient to do so, *see* Bond, *supra*, at 37—banning racial and sexual discrimination at the ballot box required further revision of the Constitution. *See* U.S. Const. amends. XV, XIX.

In addition to political rights, the Clause quite clearly does not reach *entitlements* such as welfare benefits. *See Saenz*, 526 U.S. at 527 (THOMAS, J.). A share in such public resources would amount to "cotenancy in the common property of the state," *Corfield*, 6 F. Cas. at 552, and thus need not extend to all citizens equally. But when it comes to civil rights of contract and property, the Clause clearly mandates nondiscrimination against United States citizens.

In sum, the law at issue denies United States citizens basic Tennessee contract and property rights solely because they have not lived in the state long enough. In so doing, it necessarily violates the Fourteenth Amendment's Privileges or Immunities Clause.

* * *

Amici acknowledge that much of the forgoing departs from the reasoning and interpretation underlying this Court's Privileges or Immunities Clause jurisprudence. In particular, the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), interpreted the Clause to protect a more limited scope of citizenship rights owing their existence *only* to national law. *See id.* at 74–75.

"Legal scholars agree," however, "that the Clause does not mean what the [*Slaughter-House*] Court said it meant." *Saenz*, 526 U.S. at 522 n.1 (THOMAS, J.). And the effect of the *Slaughter-House* ruling has been to hollow-out the "stronger class of rights" the Fourteenth Amendment guarantees to *citizens* over other persons. Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the*

Fourteenth Amendment, 1 N.Y.U. J. L. & Liberty 1096, 1097 (2005); *see* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & Liberty 334 (2005); *see also* U.S. Const. amend. XIV, § 1 (protecting the "privileges or immunities" of "citizens of the United States," but only prohibiting deprivations of "due process" and "equal protection of the laws" with regard to "any person").

Moreover, "this Court's marginalization of the [Privileges or Immunities] Clause" has not—indeed, *could* not—change the text's true meaning and force, which the Court should consider more deeply now. *McDonald*, 561 U.S. at 809 (THOMAS, J.). After all, "*stare decisis* is only an 'adjunct' of" this Court's "duty ... to decide by [its] best lights what the Constitution means." *Id.* at 812 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 963 (1992) (REHNQUIST, C.J., concurring in judgment in part and dissenting in part)). In this case, text, context, and history supply the "guiding principle[s]" so lacking in this Court's "'fundamental' rights" jurisprudence. *Id.* at 811. Those same guides demand affirmance on Privileges or Immunities grounds.

CONCLUSION

The judgment of the Sixth Circuit should be affirmed on the grounds that the Tennessee law violates the Privileges or Immunities Clause of the Fourteenth Amendment.

Respectfully submitted,

JEREMY M. BYLUND
Counsel of Record
MARISA C. MALECK
GABRIEL KRIMM
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
mmaleck@kslaw.com
(202) 737-0500

Counsel for Amici Curiae

December 20, 2018

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF MAJOR BRANDS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

RICHARD B. WALSH, JR.
Counsel of Record
LEWIS RICE LLC
600 Washington Avenue, Suite 2500
St. Louis, MO 63101
rwalsh@lewisrice.com
(314) 444-7600
Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. TENNESSEE'S RESIDENCY REQUIREMENTS ARE PROTECTED BY THE TWENTY-FIRST AMENDMENT 4

A. Under this Court's Decision in Granholm v. Heald, this Court Already Has Determined that Statutes Requiring that Wholesalers and Retailers Be "In-State" to Distribute and Sell Liquor, Respectively, Are Protected by the Twenty-First Amendment 4

B. Tennessee's Residency Requirements Are Related to Legitimate State Interests. 9

1. The Experience of Major Brands Has Demonstrated the Benefits of Residency Requirements 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Arnold's Wines, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009) 7

Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006) 8

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 6, 8

Granholm v. Heald, 544 U.S. 460 (2005) ..... passim

North Dakota v. United States, 495 U.S. 423 (1990) 5, 6

S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799 (8th Cir. 2013) 5, 7, 10

STATUTES

Mo. Rev. Stat. § 311.015 11

Mo. Rev. Stat § 311.060 1

Tenn. Code Ann. § 57-3-204 14

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XXI ..... passim

INTEREST OF *AMICUS*[1]

Major Brands, Incorporated ("Major Brands") is a Missouri corporation in good standing and is a Missouri-resident wholesaler of wine, spirits, and beer in the State of Missouri. As a Missouri based and operated wholesaler, Major Brands is licensed by the Missouri Division of Alcohol and Tobacco Control to engage in the wholesale distribution of wine and liquor.

Major Brands operates under Missouri's three-tier liquor distribution system, which includes a statute that limits the issuance of corporate wholesaler licenses to only "resident corporations." *See* Mo. Rev. Stat § 311.060. A "resident corporation" under the statute is a corporation incorporated under the laws of the State of Missouri whose officers, directors, and at least 60% of its shareholders are "qualified legal voters and taxpaying citizens of the county and municipality in which they reside and who shall have been bona fide residents of the state for a period of three years continuously immediately prior to the date of filing of application for a license." *Id.*

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae* states that Petitioner and Respondents have all entered blanket consents on the docket to the filing of *amicus curiae* briefs.

While the present case involves residency requirements at the retail tier, the Court's decision may likely impact residency requirements at the wholesale tier, as well. Accordingly, as a wholesaler operating within a State three-tier liquor distribution system that includes a three-year in-state residency requirement for licensure, Major Brands has a direct and compelling interest in ensuring that the validity of such residency requirements within a three-tier system are upheld and that the State-determined policies that this regulatory scheme is intended to promote and protect are not compromised.

SUMMARY OF ARGUMENT

In this litigation, Respondents challenge Tennessee's constitutionally established right to determine for itself the best way to regulate the distribution and sale of intoxicating liquors within Tennessee's borders. Specifically, Respondents contend that Tennessee lacks the ability to require that individuals, or in the case of a corporation, the officers, directors, and stockholders, desiring to sell liquor at retail within the State of Tennessee reside in Tennessee for two years before they are eligible for a license to sell liquor to Tennessee consumers. Respondents' challenge fails, and the decisions of the District Court and of the Court of Appeals should be overturned, because Tennessee's residency requirements are protected by the Twenty-first Amendment of the United States Constitution.

This Court, in *Granholm v. Heald*, 544 U.S. 460 (2005), already has considered and rejected the arguments raised by Respondents. In that case, consistent with prior prece-

dent, the Court unanimously expressed constitutional approval of three-tier distribution systems (such as Tennessee's) and concluded that the Twenty-first Amendment empowers a State to require that all liquor sold for use in the State be purchased from a licensed, in-state wholesaler and sold by a licensed, in-state retailer. Indeed, the majority in *Granholm* directly addressed and assuaged the States' concerns that an adverse decision in *Granholm* "would call into question the constitutionality of the three-tier system" and the residency requirements within such a system by stating that such a system is "unquestionably legitimate." *Id.* at 488–89. Accordingly, this Court already has decided, unanimously, that the Twenty-first Amendment protects State requirements that its liquor wholesalers and retailers be residents of the State.

The desirability of such residency requirements, moreover, is amply illustrated by Major Brands' experience as a licensed wholesaler operating within a residency requirement in the State of Missouri. Residency requirements ensure that individuals distributing and selling liquor within a State are accessible, accountable, and actively engaged in the enforcement of the State's regulations and public policies concerning the distribution of liquor.

This Court should reject Respondents' attempt to second-guess the considered judgment of the Tennessee General Assembly and should discard Respondents' misreading of the Twenty-first Amendment, *Granholm*, and other precedent. The judgment of the District Court and the

Sixth Circuit's decision affirming the same should be reversed.

ARGUMENT

I. TENNESSEE'S RESIDENCY REQUIREMENTS ARE PROTECTED BY THE TWENTY-FIRST AMENDMENT.

A. Under this Court's Decision in *Granholm v. Heald*, this Court Already Has Determined that Statutes Requiring that Wholesalers and Retailers Be "In-State" to Distribute and Sell Liquor, Respectively, Are Protected by the Twenty-First Amendment.

The Court should be under no illusion as to what Respondents are seeking in this litigation: Respondents directly challenge Tennessee's constitutional right to structure and regulate its system for the distribution and sale of intoxicating liquors within its borders as it sees fit. Specifically, Respondents argue, and the courts below incorrectly concluded, that the dormant Commerce Clause forbids States from excluding out-of-state retailers within a State-defined three-tier system of liquor distribution unless such discrimination satisfies some level of heightened scrutiny. The Supreme Court rejected precisely this argument in *Granholm*, however.

Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Supreme Court has ex-

plained that, "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota v. United States*, 495 U.S. 423, 433 (1990).

In *Granholm*, all nine members of the Court agreed that the Twenty-first Amendment grants States virtually plenary authority to structure three-tier liquor distribution systems as they see fit—including the authority to do so in a way that facially discriminates against out-of-state wholesalers and retailers. *See Granholm*, 544 U.S. at 489; *id.* at 518 (Thomas, J. dissenting). Under a three-tier system of distribution, a producer (the first tier) sells its wine or spirits to a licensed in-state wholesaler (the second tier), which ensures that all excise taxes have been paid and then delivers those products to a licensed in-state retailer (the third tier). *E.g., S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 802 (8th Cir. 2013). The specific question presented in *Granholm* involved the constitutionality of State laws that allowed in-state wine producers, but not out-of-state producers, to obtain licenses to sell their products directly to consumers. 544 U.S. at 465–66. Critically for present purposes, however, the States defending their laws argued that, if the Court held those laws unconstitutional, it would also cast doubt on the constitutionality of residency requirements applicable to licensed wholesalers and retailers—requirements that, by definition, discriminate against out-of-state interests. *Id.* at 488.

In holding that the Twenty-first Amendment does not authorize discrimination against out-of-state ***products***, the Court squarely addressed, and assuaged, the States' concern. The majority stated that three-tier systems are "unquestionably legitimate" under the Twenty-first Amendment. 544 U.S. at 488–89 (quoting ***North Dakota***, 495 U.S. at 432). The majority specifically distinguished between discrimination against out-of-state products, which the Twenty-first Amendment does not authorize, and decisions regarding "how to structure the liquor distribution system" in the State, over which "[t]he Twenty-first Amendment grants the States virtually complete control." ***Granholm***, 544 U.S. at 488 (quoting ***Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.***, 445 U.S. 97, 110 (1980)). The majority concluded that "[s]tate policies are protected under the Twenty-first Amendment" as long as "they treat liquor produced out of state the same as its domestic equivalent." ***Granholm***, 544 U.S. at 489. In so concluding, the majority emphasized that "[t]he Twenty-first Amendment . . . empowers [a State] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." ***Id.*** (quoting ***North Dakota***, 495 U.S. at 447 (Scalia, J., concurring in judgment)).

Unsurprisingly, the dissenting Justices agreed with the majority that the Twenty-first Amendment authorizes States to enact residency requirements as part of their three-tier distribution systems, even if those requirements necessarily discriminate against out-of-state interests. ***Granholm***, 544 U.S. at 518 (opinion of Thomas, J.). After surveying the history of the Twenty-first Amendment and

state regulations after its ratification, the dissent concluded that it is "understandable that the framers of the Twenty-first Amendment . . . would have wanted to free States to discriminate between in-state and out-of-state wholesalers and retailers." *Id.* at 524. When the majority and dissenting opinions in *Granholm* are considered together, therefore, it is clear that all nine members of the Court agreed that residency requirements of the type at issue here are authorized by the Twenty-first Amendment.

The Supreme Court's reasoning in *Granholm* defeats any argument that the Court's holding concerning discrimination against out-of-state *products* applies equally to discrimination within a State's three-tier distribution system. As explained above, the Court took care to clarify the implications of its holding in *Granholm* for the three-tier system and, in so doing, rejected precisely the approach that Respondents advance here. As other courts of appeals have correctly recognized in interpreting *Granholm*, the Court explicitly limited its holding to discrimination against out-of-state products, and permitted discrimination against out-of-state wholesalers and retailers to continue as part of the administration of three-tier systems. *See S. Wine & Spirits of Am., Inc.*, 731 F.3d at 809 (holding that Missouri's in-state wholesaler residency requirements are protected by the Twenty-first Amendment because the "three-tier system is 'unquestionably legitimate,' *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), and that system includes the 'licensed in-state wholesaler.'"); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190–91 (2d Cir. 2009) (concluding that a chal-

lenge to discrimination against out-of-state retailers was "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system"); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (noting, in rejecting a challenge to the discriminatory regulation of alcohol retailers, that *Granholm* "repeatedly" distinguished between discrimination against out-of-state products and the residency requirements of three-tier systems).

The *Granholm* Court explained that, far from limiting States' options in requiring its wholesalers and retailers have an in-state presence, "[t]he Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *Midcal*, 445 U.S. at 110). Accordingly, it is within Tennessee's power to ensure that its wholesalers and retailers have an in-state presence and, therefore, to define that in-state presence to ensure it is substantial and genuine to guarantee that the people actually in charge of the wholesaler and/or retailer will be accessible and accountable.

Indeed, there can be no doubt that the *Granholm* Court was well aware of residency requirements such as Tennessee's when it expressed its approval of in-state requirements for wholesalers and retailers. The dissenting opinion specifically catalogued state licensing schemes that discriminated by "requiring in-state residency or physical presence as a condition of obtaining licenses." 544 U.S. at 518 & n.6 (opinion of Thomas, J.).

Accordingly, the very argument Respondents make in this case, and which was adopted by the District Court and a majority of the Sixth Circuit, already has been considered and rejected by this Court. States' judgments regarding the inclusion and scope of residency requirements at the wholesale and retail level of their three-tier systems are protected by the Twenty-first Amendment. This Court should likewise reject Respondents' argument and reverse the District Court's judgment in Petitioner's favor.

B. Tennessee's Residency Requirements Are Related to Legitimate State Interests.

Although the Twenty-first Amendment and the precedent construing the same settles Tennessee's authority to enact the residency requirements at issue here without the need for policy arguments, the historical record presented in this Court's prior Twenty-first Amendment decisions and to this Court in other briefs illustrates why Tennessee's decision to demand true in-state presence of its retailers is an eminently reasonable one. Major Brands will not reiterate that record here, but Major Brands respectfully submits its experience as a wholesaler in Missouri to demonstrate that residency requirements ensure that individuals behind the distribution and sale of liquor are accessible, accountable, and actively engaged in the enforcement of the State's regulations and public policies concerning the distribution of liquor.

1. *The Experience of Major Brands Has Demonstrated the Benefits of Residency Requirements.*

Major Brands, a Missouri wholesaler of liquor, operates under a three-tier distribution system that has certain residency requirements for liquor wholesalers.[2] As one of the few wholesalers that distributes spirits, wine and beer statewide, Major Brands respectfully submits that an in-state presence is a core component of a three-tier system. Indeed, Justice Thomas explained in his dissenting opinion in *Granholm* that "the requirement that liquor pass through a licensed in-state wholesaler is a core component of the three-tier system." 544 U.S. at 518.

Missouri has expressly noted the purpose of its liquor control law:

> Alcohol is, by law, an age-restricted product that is regulated differently than other products. The provisions of this chapter establish vital state regulation of the sale and distribution of alcohol beverages in order to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed

---

[2] The arguments in this case implicate the constitutionality of Missouri's wholesaler residency requirements under the Twenty-first Amendment. The Eighth Circuit, in *S. Wine & Spirits of Am., Inc.*, 731 F.3d at 802, held that Missouri's wholesaler residency requirements are constitutional under the Twenty-first Amendment.

> of state-licensed alcohol producers, importers, distributors, and retailers.

Mo. Rev. Stat. § 311.015.

Wholesalers acquire wine and spirits from various suppliers around the globe; take ownership and possession of those products in Missouri; and deliver them to thousands of retailers for sale to, and consumption by, Missouri consumers. Given the role of wholesalers in the distribution process, it is unsurprising that the wholesale tier is subject to extensive oversight and control by the applicable regulator, the Division of Alcohol and Tobacco Control. For example, wholesalers must ensure that Missouri excise taxes have been paid on the alcohol they distribute; their products are subject to inspection regarding alcohol content, volume, and contaminants or other health and safety concerns; and their interactions with retailers are heavily regulated to ensure that only licensed retailers receive alcohol and that all retailers pay the same price for the same products.

Above and beyond the requirements imposed by law, personal interest and accountability play an important role in encouraging liquor distributors to achieve the statutory objectives of "promot[ing] responsible consumption, combat[ing] illegal underage drinking, and achiev[ing] other important state policy goals such as maintaining an orderly marketplace." Mo. Rev. Stat. § 311.015.

To begin with the obvious, Missouri's residency requirements ensure that the individuals controlling corpo-

rate wholesalers are citizens of the State. As Justice Thomas recognized in *Granholm*, "[p]resence ensures accountability." 544 U.S. at 523–24 (dissenting opinion) (internal quotation marks omitted). Presence specifically creates incentives for those individuals to be concerned with the public health and safety issues accompanying the distribution of liquor. In effect, Missouri's residency requirements ensure that individuals behind corporate wholesalers are distributing liquor in their own backyards—where they live, drive the streets, vote, and pay taxes. Individuals whose children drive the same streets as potential drunk drivers have powerful incentives not only to ensure that alcohol is distributed in a responsible manner, but also to support efforts to promote moderate consumption and to address the social ills of excessive consumption (such as alcoholism and homelessness). Out-of-state owners do not possess those incentives to nearly the same extent because, by virtue of their physical absence from the community, they are largely immune from personal reputational damage and the health and safety consequences of overconsumption.

Major Brands' experience demonstrates that the residency requirements ensure a high level of accountability and concern for the health and safety of Missouri's citizens. As residents of Missouri communities, Major Brands' owners and employees have taken leading roles in preventing underage alcohol use and curbing the toll of alcohol abuse, undertaking numerous charitable activities related thereto.

Major Brands also plays an active role in enforcing Missouri's regulations concerning the distribution of liquor. For example, Major Brands monitors retailers' compliance with state and local licensing laws and scans the market for unlicensed and "gray-market" products (*i.e.*, products that were shipped to another State but are illegally brought into Missouri for sale). Because Major Brands is in compliance with the residency requirements, moreover, it is easier for the under-funded Division of Alcohol and Tobacco Control to oversee its operations than it would be to oversee the operations of an out-of-state corporation that has not complied with the requirements.

Missouri's residency requirements reflect the Missouri General Assembly's considered judgment regarding how best to structure its liquor distribution system. As the experience of Major Brands demonstrates, those requirements concern legitimate state interests.

Similarly, Tennessee's residency requirements concern legitimate state interests. As stated by the Tennessee General Assembly:

> Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons,

> it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D), (4).

Missouri's residency requirements reflect the Missouri General Assembly's considered judgment regarding how best to structure its liquor distribution system. Likewise, Tennessee's residency requirements reflect the Tennessee General Assembly's considered judgment regarding how best to structure its liquor distribution system. The Twenty-first Amendment allows the States to make such judgments, free of interference, regarding their in-state liquor distribution systems. To find otherwise severely undermines the authority the people of the United States intended to give to States to structure and regulate the distribution and sale of liquor within their borders. The drafters of the Twenty-first Amendment did not intend for the explicit authority given to the States to regulate the sale and distribution of alcohol within their State to be swallowed up by the dormant Commerce Clause. Residency requirements directed at the distributors and sellers of liquor within a State, like those at issue here, are central to the power granted to the States and, therefore, must be

upheld. The decisions of the District Court and the Sixth Circuit should be reversed.

CONCLUSION

The judgment of the District Court and the decision of the Sixth Circuit should be reversed, and judgment should be entered in favor of Petitioner.

Respectfully submitted,

RICHARD B. WALSH, JR.
Counsel of Record
LEWIS RICE LLC
600 Washington Avenue, Suite 2500
St. Louis, MO 63101
rwalsh@lewisrice.com
(314) 444-7600

Counsel for Amicus Curiae

November 20, 2018

No. 18-96

In The
Supreme Court of the United States

TENNESSEE WINE AND
SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

BRIEF FOR THE MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANTHONY S. KOGUT
Counsel of Record
CURTIS R. HADLEY
WILLINGHAM & COTÉ, P.C.
333 Albert Ave., Suite 500
East Lansing, MI 48823
517-351-6200
akogut@willinghamcote.com
chadley@willinghamcote.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

Introduction and History 3

Analysis 8

I. The dormant Commerce Clause review required by *Granholm* applies to laws that favor in-state products or producers 8

II. In the alternative, the Court should confirm that the Twenty-first Amendment immunizes from review under the Commerce Clause state regulations that are inherent in the three-tier system, and this includes requirements that retailers and wholesalers be physically present in the State 12

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Arnold's Wines, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009) 10, 13, 21

Byrd v. Tennessee Wine and Spirits Retailers Ass'n, 883 F.3d 608 (6th Cir. 2018) 15, 20

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 5, 9

Cooper v. Texas Alcoholic Beverage Comm'n, 820 F.3d 730 (5th Cir. 2016) 15, 16, 20

Duckworth v. Arkansas, 314 U.S. 390 (1941) 3

Granholm v. Heald, 544 U.S. 460 (2005) ..... *passim*

Heublein v. South Carolina Tax Commission, 409 U.S. 275 (1972) 10

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 21

Lebamoff Enterprises, Inc. v. Rauner, Docket No. 16 C 8607, slip op., 2017 WL 2486084 (N.D. Ill. June 8, 2017), appeal pending, 7th Cir. Docket No. 17-2495 13

Lebamoff Enterprises, Inc. v. Snyder, U.S. Dist. Ct., E.D. Mich. Docket No. 2:17-cv-10191 ..... 2, 12, 17

North Dakota v. United States, 495 U.S. 423 (1990) 9, 11, 16, 21

Sarasota Wine Market, LLC v. Parson, U.S. Dist. Ct., E.D. Missouri Docket No. 4:17-cv-029792 13

TABLE OF AUTHORITIES – Continued

Page

Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control, 731 F.3d 799 (8th Cir. 2013) 11, 20

Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010) 14, 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XXI ..... *passim*

U.S. Const. art. I, § 8, cl. 3 1

STATUTES AND COURT RULES

Act of Mar. 1, 1913, ch. 90, 37 Stat. 699 (codified at 27 U.S.C. § 122) 5

Act of Aug. 27, 1935, ch. 740 § 202(b), 49 Stat. 877 5

Federal Alcohol Administration Act of 1935, 27 U.S.C. § 201 *et seq.* 16

Mich. Comp. L. § 436.1201 19

Mich. Comp. L. § 436.1217 18

Mich. Comp. L. § 436.1301 19

Mich. Comp. L. § 436.1409 19

Mich. Comp. L. § 436.1603 18

Mich. Comp. L. § 436.1605 18

Mich. Comp. L. § 436.1901 18

Mich. Comp. L. § 436.1903 18

Mich. Comp. L. § 436.1905 18

TABLE OF AUTHORITIES – Continued

Page

Mich. Comp. L. § 436.1906 18

Mich. Comp. L. § 436.2013 19

Mich. Comp. L. § 600.3801 18

Sober Truth on Preventing Underage Drinking Act, 42 U.S.C. § 290bb-25b 6

Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a(b) 6

OTHER

Brief of Ohio and 35 Other States as *Amici Curiae* in Support of Petitioner, 2004 WL 530965 (2004) 9

Bureau of Alcohol, Tobacco and Firearms (ATF), ATF Ruling 2000-1 16

Mich. Admin. Code, R. 436.1007 ..... 18, 19

Mich. Admin. Code, R. 436.1011 18

Mich. Admin. Code, R. 436.1025 18

Mich. Admin. Code, R. 436.1533 18

Mich. Admin. Code, R. 436.1631 19

Mich. Admin. Code, R. 436.1641 19

Mich. Admin. Code, R. 436.1645 18

Mich. Admin. Code, R. 436.1720 19

Mich. Admin. Code, R. 436.1725 19

Mich. Admin. Code, R. 436.1727 19

Mich. Admin. Code, R. 436.1865 19

TABLE OF AUTHORITIES – Continued

Page

Toward Liquor Control, Fosdick and Scott, 1933 by Harper & Brothers, 1960 by Raymond B. Fosdick, 2011 by The Center for Alcohol Policy 6, 7, 17

INTEREST OF *AMICUS CURIAE*[1]

The Michigan Beer and Wine Wholesalers Association ("MB&WWA") is a Michigan non-profit association of licensed Michigan beer and wine wholesalers. Its members distribute over 90% of all wine and beer sold to retailers under Michigan's three-tier distribution system.

MB&WWA is committed to working with regulators and others for responsible and effective regulation of the sale of alcoholic beverage products. MB&WWA believes state laws concerning the structure of a state's alcoholic beverage distribution system are entitled to judicial deference and that the power delegated to the States under the Twenty-first Amendment of the U.S. Constitution should be upheld.

MB&WWA has been involved, as either an intervenor or *amicus curiae*, in numerous federal and state lawsuits where state alcoholic beverage laws were challenged. MB&WWA, as an intervenor, participated in *Granholm v. Heald*, 544 U.S. 460 (2005), this Court's most recent decision on the interplay between the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3 and U.S. Const. amend. XXI. MB&WWA is participating as

---

[1] Pursuant to Sup. Ct. R. 37.6 *amicus curiae* and its counsel state that no counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money for the preparation or submission of this brief. No person other than *amicus curiae* (or its members) contributed money that was intended to fund the preparation or submission of this brief. *Amicus curiae* files this brief pursuant to the blanket consents given by the parties, copies of which are on file in the Clerk's office.

an intervenor in *Lebamoff Enterprises, Inc. v. Snyder*, U.S. Dist. Ct., E.D. Mich., Docket No. 2:17-cv-10191, which is currently pending in the Sixth Circuit Court of Appeals, Docket Nos. 18-2199/2200. The decision in the instant case will shape the result in *Lebamoff* and in other pending challenges to state-based alcoholic beverage regulation.[2]

MB&WWA supports the Petitioner for reversal of the Sixth Circuit.

SUMMARY OF ARGUMENT

Courts have disagreed on how to interpret *Granholm* with respect to state laws that do not discriminate against out-of-state products or producers, but regulate the retailer and wholesaler tiers of a State's three-tier distribution system.

The Twenty-first Amendment and this Court's precedent require that rational laws regulating in-state retailers and wholesalers are free from the normal operation of the dormant Commerce Clause when those laws do not discriminate against out-of-state products or producers. The Sixth Circuit's decision

[2] The District Court in *Lebamoff* entered an order staying its decision pending the appeal and staying enforcement of the injunctive portion of its decision pending this Court's decision in the present case. Document No. 47, order entered October 11, 2018. The Sixth Circuit in *Lebamoff* entered a stipulated order holding the appeals in abeyance pending this Court's decision. Document No. 15-2, order entered November 6, 2018.

should be reversed and the owner residency law should be deemed constitutional.

However, if this Court affirms the Sixth Circuit, it should preserve three-tier distribution systems that funnel alcoholic beverages through licensed in-state wholesalers and retailers, which *Granholm* recognized were "unquestionably legitimate." In particular, this Court should explicitly affirm the Sixth Circuit's recognition that requiring *physical presence* of licensed retailers and wholesalers is an inherent part of three-tier systems and is consistent with the powers given to States by the Twenty-first Amendment, free of dormant Commerce Clause restraints that might otherwise apply were another product at issue.

ARGUMENT

Introduction and History

A.

It has long been recognized that "liquor" is "a lawlessness unto itself"[3] and that the Twenty-first

[3] *Duckworth v. Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in result):

> "The people of the United States knew that liquor is lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of bounds.'"

Amendment gives states the primary responsibility for regulating distribution of wine, beer and spirits for use within their borders.

The last eight decades have demonstrated the utility and effectiveness of state-based regulation of alcoholic beverages. Before and during National Prohibition, abuse of alcoholic beverages was an acute problem generating constant public outcry. Because of generally effective state regulation since the repeal of National Prohibition, it has been no more than a chronic problem.

Public concern with both intemperate and underage consumption is obvious and justified. This leads to efforts to control over-selling as the best way to control over-consumption. The alcoholic seller's appetite for profit was to be restricted along with the buyer's appetite for alcohol. Restriction was extended beyond drinkers and retailers up the supply chain to create a culture of control. All sellers were to be regulated. No one group was supposed to feel unfairly and disproportionately regulated unlike the experience of some during National Prohibition. No one engaged in selling of alcoholic beverages was to be burdened so onerously that they were pressed to disobey the law.

State enforcement powers are needed to ensure accountability, curb overstimulation of sales, avoid disorderly market conditions and ensure compliance with state regulations. State laws defining who is allowed to traffic in alcoholic beverages should not be lightly set aside. Otherwise, there is great danger that the

balance struck by a State's legislature – furthering temperance by restricting selling while not endangering temperance by over-restricting and thereby inciting illicit and unregulated sales – will be severely compromised.

B.

In 1913, Congress exercised its power under the Commerce Clause to enact the Webb-Kenyon Act which forbids the "shipment or transportation . . . of any . . . intoxicating liquor of any kind from one State . . . into any other State . . . which said . . . liquor is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." Act of Mar. 1, 1913, ch. 90, 37 Stat. 699 (codified at 27 U.S.C. § 122). In 1933, at the end of National Prohibition, Section 2 of the Twenty-first Amendment made this federal protection of State power permanent by placing it into the Constitution. Section 2 prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." In 1935, to show it recognized the States' power, Congress re-enacted Webb-Kenyon. Act of Aug. 27, 1935, ch. 740 § 202(b), 49 Stat. 877.

From the repeal of National Prohibition through *Granholm*, this Court's decisions have confirmed the power granted by the Twenty-first Amendment to the States over how to structure their alcoholic beverages distribution systems. See, e.g., *California Retail Liquor*

Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system.").

The primacy of state regulation continues to be recognized and confirmed by Acts of Congress. In 2000, Congress enacted the "Twenty-first Amendment Enforcement Act," 27 U.S.C. § 122a(b), giving state Attorneys General the ability to avail themselves of federal court jurisdiction and injunctive relief to enforce state laws dealing with alcohol. In 2006, Congress passed the "Sober Truth on Preventing Underage Drinking Act," 42 U.S.C. § 290bb-25b. In that Act, Congress recognized that "alcohol is a unique product and should be regulated differently than other products" and that "states have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts." 42 U.S.C. at § 290bb-25b(b)(7).

C.

With the repeal of National Prohibition, states were faced with the daunting task of establishing alcoholic beverage distribution systems. Of great influence in that effort was the study reported in *Toward Liquor*

Control[4], which explored and made recommendations about different forms of regulation.

For states deciding to use a licensing system to regulate the distribution of alcoholic beverages, *Toward Liquor Control* recommended[5] adoption of various practices including: a single state licensing board, tenured administrators, prohibitions against "tied house" arrangements which have "all the vices of absentee ownership" where the "manufacturers knew nothing and cared nothing about the community,"[6] restrictions on the number of retail outlets, a classification system for licenses which recognizes "the inherent differences between beer, wine and spirits,"[7] restrictions on hours of sale, licensing of both persons *and* premises, prohibitions on sales practices that would encourage consumption, limitations on advertising, and efforts to control profits and prices.[8]

Many states adopted their own versions of these recommendations to form the various parts of their three-tier distribution systems requiring alcoholic

---

[4] *Toward Liquor Control*, Fosdick and Scott, 1933 by Harper & Brothers, 1960 by Raymond B. Fosdick, 2011 by The Center for Alcohol Policy.

[5] *Id.* at 28.

[6] *Id.* at 29. A residency requirement simply reflects a Legislature's determination that out-of-state owners, whether or not they be alcoholic beverage manufacturers, have all the vices of out-of-state absentee owners.

[7] *Id.* at 30.

[8] *Id.* at 28 to 34.

beverages to pass through licensed in-state wholesalers and in-state retailers who can be effectively regulated.

What is inherent in a three-tier distribution system is not limited only to those elements that exist in *every* three-tier system (i.e., the lowest possible common denominator). Nor are inherent aspects of three-tier systems limited to only those things that existed when a three-tier system was first devised, because the purpose of state-based regulation of alcoholic beverages is to allow each State the ability to find the right regulatory "fit" for its population and circumstances and to learn from its regulatory experiences.

Analysis

I. The dormant Commerce Clause review required by *Granholm* applies to laws that favor in-state products or producers.

A.

Granholm struck down exceptions to three-tier systems in New York and Michigan that, in effect, allowed in-state wineries to by-pass the three-tier distribution systems while requiring out-of-state wineries to comply with them. In the briefing, Michigan and New York expressed concern that striking down the statutory exceptions would undercut the States' Twenty-first Amendment authority to regulate in-state distribution of alcohol, a concern echoed by 36 other states in their *amici curiae* brief in support of Michigan's petition: "The possibility that federal courts may eviscerate

the States' ability to maintain their liquor control systems, as some Circuit Courts have already done, is of paramount concern to all States."[9]

This Court responded to the States' concerns:

> "The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. 'The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' *Midcal*, *supra*, at 110, 100 S.Ct. 937. * * * States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is 'unquestionably legitimate.' *North Dakota v. United States*, 495 U.S., at 432, 110 S.Ct. 1986. See also *id.*, at 447, 110 S.Ct. 1986 (SCALIA, J., concurring in judgment) ('The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler'). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."

---

[9] Brief of Ohio and 35 Other States as *Amici Curiae* in Support of Petitioner, 2004 WL 530965 (2004), p. 4.

B.

Despite the above-quoted passage, lower courts continue to express uncertainty as to the tension between the dormant Commerce Clause and the Twenty-first Amendment even where a challenged law does not discriminate against out-of-state products or producers.[10] Some Circuit Courts (and also District Courts) are still reaching decisions that threaten effective state alcoholic beverage regulation, including the need for physical presence[11] or the use of residency as an element of physical presence, so long as the residency requirement is reasonable.

The nondiscrimination review adopted in *Granholm* applies only to statutes that favor in-state products or producers and not to state laws governing the in-state distribution of alcohol through licensed

---

[10] As noted in Judge Calabresi's concurring opinion in *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009):

> "[T]he jurisprudence the Supreme Court has created through this updating [of the meaning of the Twenty-first Amendment] presents other problems. Regrettably, it often leaves lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from the High Court's Twenty-First Amendment decisions."

[11] The insistence on physical presence for effective enforcement has been upheld even at the supplier level. See *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972), which upheld a physical presence requirement on manufacturers in circumstances in which, unlike those in *Granholm*, there was no discriminatory exemption from three-tier requirements for any in-state suppliers.

wholesalers and retailers. This view of *Granholm* was articulated in, for example, *Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), upholding a Missouri residency requirement for wholesalers:

> "Given *Granholm*'s recency and specificity, we think the Court's discussion there provides the best guidance. The three-tier system is 'unquestionably legitimate,' *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), and that system includes the 'licensed in-state wholesaler.' *Id.* (quoting *North Dakota*, 495 U.S. at 447, 110 S.Ct. 1986 (Scalia, J., concurring in the judgment)). More broadly, state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and producers are 'protected under the Twenty-first Amendment.' *Id.* Viewed in context, the Court's statement must mean that such policies are 'protected' against constitutional challenges based on the Commerce Clause.
>
> * * *
>
> If it is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause, *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), then we think States have flexibility to define the requisite degree of 'in-state' presence to include the in-state residence of wholesalers' directors and

officers, and a super-majority of their shareholders."

MB&WWA submits, initially, the Court should rule the Twenty-first Amendment insulates from review under the dormant Commerce Clause laws that are rationally related to the State's core powers under the Twenty-first Amendment and do not favor in-state products or producers.

II. In the alternative, the Court should confirm that the Twenty-first Amendment immunizes from review under the Commerce Clause state regulations that are inherent in the three-tier system, and this includes requirements that retailers and wholesalers be physically present in the State.

A.

Subsequent to *Granholm* there has been an effort to negate judicially common state requirements that retailers and wholesalers be physically present in the state by claiming such laws violate the dormant Commerce Clause.

One of the most recent instances of that effort is *Lebamoff, supra*, in which the District Court effectively struck down Michigan's three-tier distribution system by enjoining the State from enforcing laws that would prohibit unlicensed out-of-state retailers from directly shipping wine to Michigan consumers because Michigan allows in-state retailers (operating within Michigan's three-tier system) to deliver by common carrier

to consumers in the State. Other pending cases challenging physical presence requirements for retailers include *Lebamoff Enterprises, Inc. v. Rauner*, Docket No. 16 C 8607, slip op., 2017 WL 2486084 (N.D. Ill. June 8, 2017), appeal pending, 7th Cir. Docket No. 17-2495, and *Sarasota Wine Market, LLC v. Parson*, U.S. Dist. Ct., E.D. Missouri Docket No. 4:17-cv-029792.

Those seeking to circumvent effective state regulation have cited language in *Granholm* regarding the ordinary nondiscrimination principles of the dormant Commerce Clause, in efforts to persuade lower courts to ignore the Twenty-first Amendment and allow them to operate outside of the three-tier system within which in-state retailers must operate.

B.

The Second, Fifth and Sixth Circuits have rejected that strained interpretation of *Granholm*, concluding the holding that three-tier systems are "unquestionably legitimate" necessarily forecloses Commerce Clause challenges to state laws that are an inherent part of three-tier systems, including laws requiring retailers to be physically present in the state.

In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), the plaintiffs challenged parts of New York's Alcoholic Beverage Control Law ("ABC Law"), claiming the laws violated the dormant Commerce Clause to the extent they prohibited out-of-state retailers from selling and delivering wine directly to New York consumers but allowed licensed in-state retailers to do so.

The Court found that was a challenge to the State's power to require retailers to be physically present in the State, an "integral" part of the three-tier system:

> "In reaching its holding, the *Granholm* Court noted that the challenged regulations were discriminatory exceptions to, rather than integral parts of, the underlying three-tier systems.
>
> * * *
>
> Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, we need not analyze the regulation further under Commerce clause principles. The [pertinent sections of] New York's ABC Law are an integral part of New York's three-tier system. Because New York's laws evenhandedly regulate the importation and distribution of liquor within the state, we hold that they do not run afoul of the Commerce Clause. 571 F.3d 185, 191-192." (Footnote omitted.)

Similarly, in *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818 (5th Cir. 2010), the Court held disparate treatment inherent in the three-tier system is permissible under *Granholm*: "The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself. If *Granholm*'s legitimizing of the tiers is to have meaning, it must at least mean that." The Court also recognized the

"beginning premise" that "wholesalers and retailers may be required to be in the state."[12]

In the present case[13] the Sixth Circuit followed the reasoning of the Fifth Circuit in *Cooper v. Texas Alcoholic Beverage Commission*, 820 F.3d 730 (5th Cir. (2016) (*"Cooper II"*), that while durational residency is not an inherent aspect of the three-tier system immune from Commerce Clause review, physical presence is. After quoting from *Cooper II*, 820 F.3d at 743, the Court stated, 883 F.3d at 623:

> "In this language, the Fifth Circuit created an important distinction: requiring retailer- or wholesaler-alcoholic-beverages businesses to be within the state may be essential to the three-tier system, but imposing durational-residency requirements is not, particularly when those durational-residency requirements govern owners. n8
>
> > n8 The dissent asserts that in-state distribution regulations are always discriminatory in some manner, and in some ways, the dissent is correct that '[w]hat matters is what type of discrimination is *permissible*.' [883 F.3d at 634.] However, the Fifth Circuit acknowledged this dilemma, and it rectified the issue—requiring wholesalers and retailers to be in the state is permissible, but requiring owners

---

[12] 612 F.3d 809, 821.

[13] *Byrd v. Tennessee Wine and Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018).

> to reside within the state for a certain period is not. *Cooper II*, 820 F.3d at 743. * * * "

It is especially important that States have the ability to require the physical presence of retailers, because alcoholic beverage retailers (unlike producers, importers and wholesalers) are not required to hold any federal permit in order to operate. Rather, retailers are regulated by the States.[14]

The holdings in these Court of Appeals cases are consistent with *Granholm*. They are also consistent with *North Dakota v. United States*, 495 U.S. 423 (1990) (Plurality opinion of Justice Stevens):

---

[14] There is no *federal* permit available to, or required of, alcoholic beverage retailers. Rather, retailers are licensed and regulated by the individual states, under each state's own laws which reflect local needs, local history, and local views on how beer, wine or spirits should be distributed and sold. There is no federal retailer permit which can be revoked or suspended if a retailer fails to comply with state law. In contrast, wineries and wine wholesalers (who form the other tiers of the three-tier wine distribution system) are required to have a federal permit and to comply with federal and state laws. See Federal Alcohol Administration Act of 1935, 27 U.S.C. § 201 *et seq.* ("FAA Act"). See also Bureau of Alcohol, Tobacco and Firearms, ATF Ruling 2000-1 (which can be found at https://www.ttb.gov/rulings/2000-1.htm) which explains that "[r]etailers are not required to obtain basic permits under the FAA Act," and "while the ATF is vested with authority to regulate interstate commerce in alcoholic beverages pursuant to the FAA Act, the extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."). The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), the successor agency to ATF, confirms that ATF Ruling 2000-1 "remains in effect and reflects the policy of TTB today." See http://www.ttb.gov/publications/direct_shipping.shtml.

> "The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate. (Citations omitted.)
>
> * * *
>
> Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly."

Requiring physical presence of licensed retailers and wholesalers assures meaningful enforcement of regulations designed to protect the public, promote temperance and foster orderly markets. Physical presence allows state officials to inspect premises of wholesalers and retailers to ensure compliance, to cross-check records of wholesaler and retailer licensees, to ensure that only products registered with the State are being sold to consumers, and to otherwise aid enforcement, including through sting operations.

Michigan's three-tier system has been the focus of federal litigation, including in *Granholm* and *Lebamoff*, and Michigan's laws are typical of those found in other states.[15] Therefore, some of the pertinent laws

---

[15] See discussion of the study reported in *Toward Liquor Control*, *supra*, pp. 5-6.

and regulations demonstrating that physical presence of licensed wholesalers and retailers is a required and an inherent part of the three-tier system are set out in the accompanying footnote.[16] Many of these

---

[16] The three-tier system has strong "anti-tied house" provisions to prevent integration among the three tiers and to ensure that manufacturers and wholesalers do not dominate or hold any impermissible financial interests in a retailer. Mich. Comp. L. §§ 436.1603 and 436.1605.

Retail licensees are prohibited from selling or furnishing wine or other alcohol beverages to persons under 21 years of age, and are required to obtain evidence of age and identity prior to sale. Mich. Comp. L. §§ 436.1905 and 436.1906(6); Mich. Admin. Code, R. 436.1533(5).

A license applicant is subject to rules and restrictions related to the actions of its officers, directors, managers, agents, and employees, which are regularly checked by the state. Mich. Admin. Code, R. 436.1011. Violations of these laws and regulations can subject an applicant or a licensee to denial of an application or of renewal of a license, suspension and revocation of the liquor license. Mich. Comp. L. § 436.1903.

Retail licensees must maintain books and records and make them available for inspection by the State. Mich. Admin. Code, R. 436.1007 and R. 436.1645. This allows the State to track the distribution of alcoholic beverages to ensure compliance with laws and assure that alcoholic beverages are not "bootlegged" and being illegally diverted from the three-tier system. The State has the right to inspect the premises of licensees to make sure retailers and wholesalers are complying with the various laws and administrative rules. Mich. Comp. L. § 436.1217; Mich. Admin. Code, R. 436.1007 and R. 436.1645. Retailers are prohibited from warehousing alcohol on unlicensed premises. Mich. Comp. L. § 436.1901(1); Mich. Admin. Code, R. 436.1025. The premises of a retailer upon which an unlawful sale occurs are deemed a public nuisance and subject to abatement, which is a strong deterrent. Mich. Comp. L. § 600.3801(d). These enforcement mechanisms would not exist, as a practical matter, without physical presence.

regulations (as well as others) would be impossible to effectively enforce without physical presence of the licensee giving the State the ability to visit and inspect the premises and records, and to penalize non-compliance with meaningful sanctions including putting a transgressor completely out of business by license revocation or closing.

C.

Residency is different than physical presence.[17] One is, or is not, physically located within the borders

---

Licensed wholesalers and retailers have responsibility for collecting and remitting state and local taxes and must keep extensive records, which allows the State to cross check records among the various tiers to ensure compliance. Mich. Comp. L. §§ 436.1301 and 436.1409; Mich. Admin. Code, R. 436.1007, R. 436.1641, R. 436.1725, R. 436.1727 and R. 436.1865. Licensees are required to file monthly statements indicating the total amount paid for alcoholic liquor purchased during the preceding month. Mich. Admin. Code, R. 436.1631 and R. 436.1720.

A "cash law" prohibits wholesalers from selling and retailers from buying wine on credit. Mich. Comp. L. § 436.2013. This ensures retailers are operating a viable business (and thus less likely to skirt the law). It also prevents wholesaler favoritism ("aid and assistance") through the grant of credit, which could be used to induce a retailer to only sell the products carried by the wholesaler offering credit terms (thus reducing consumer choice) and leaving the disfavored retailers less viable and possibly more likely to skirt the law.

Under the three-tier system, the enforcement activities of Michigan's Liquor Control Commission are assisted by Michigan law enforcement officers. Mich. Comp. L. § 436.1201(4).

[17] Michigan, for example, does not require its retailers, or the owners of retailer entities, to reside in the State. But Michigan does require that retailers and wholesalers of alcoholic beverages

of the state. There is no such thing as an arguably excessive physical presence requirement.

A residency requirement, including a durational one, has been judged correctly to be legitimate as an element of a state's definition of physical presence, with plausible regulatory benefits. See *Southern Wine and Spirits of America, Inc.*, *supra*. Other durational residency requirements have been rejected as excessive instances of purely protectionist intent. See *Cooper II*, *supra*, and *Byrd*, *supra*. It is hardly surprising that the Fifth Circuit in *Cooper II* did not reinstate a residency requirement that had not existed in Texas for twenty years and which the State was not requesting.

The protection of physical presence requirements for the two lower tiers by the Twenty-first Amendment is absolute, often referred to as "inherent," "integral" or "critical" to a three-tier regulatory scheme. The protection of residency requirements may be more limited and fact dependent. See *Byrd*, *supra*, opinion of Sutton, J., concurring in part and dissenting in part, 883 F.3d at 628-636.

Even assuming *arguendo* that the Courts in *Cooper II* and *Byrd* were correct that the residency laws at issue there were not immune from challenge, those Courts were wrong in stating that no type of residency law is immune. Such a broad statement was merely *dictum* and contrary to the injunction of

---

have a physical presence in the State which allows effective enforcement of comprehensive regulations.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964), that: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."

CONCLUSION

State laws requiring retailers and wholesalers to be present in the state are an inherent part of the three-tier system and are valid under the Twenty-first Amendment, regardless of whether the regulations may discriminate against out-of-state retailers or wholesalers who do not participate in the three-tier system.

The Court's decision in the present case will likely have great significance with respect to the ongoing attempts to dismantle three-tier systems and, effectively, the Twenty-first Amendment.

If the Court chooses to narrow[18] Twenty-first Amendment powers to regulate owner residency of retailers, MB&WWA requests the Court to reaffirm *Granholm*'s and *North Dakota*'s recognition that States may require alcoholic beverages to pass through licensed wholesalers and retailers, and to confirm that states

[18] See Judge Calabresi's concurring opinion in *Arnold's Wines*, 571 F.3d 185, 191.

may require licensed retailers and wholesalers to be physically present in the state, free of any dormant Commerce Clause concerns.

Respectfully submitted,

Dated: November 16, 2018

ANTHONY S. KOGUT
Counsel of Record
CURTIS R. HADLEY
WILLINGHAM & COTÉ, P.C.
333 Albert Ave., Suite 500
East Lansing, MI 48823
517-351-6200
akogut@willinghamcote.com
chadley@willinghamcote.com

Counsel for Amicus Curiae

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

PETITIONER,

V.

ZACKARY W. BLAIR, ET AL.,

RESPONDENTS.

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF AMICUS CURIAE OF ALAN B. MORRISON URGING AFFIRMANCE

ALAN B. MORRISON
COUNSEL OF RECORD
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H STREET NW
Washington, DC 20052
(202) 994-7120
abmorrison@law.gwu.edu

December 12, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION & SUMMARY OF ARGUMENT 1

ARGUMENT 4

THE JUDGMENT BELOW SHOULD ALSO BE AFFIRMED ON THE ALTERNATIVE BASIS OF THE PRIVILEGES & IMMUNITIES CLAUSE... 4

A. THE OPERATIVE FACTS. 4

B. PROCEDURAL OBJECTIONS TO DECIDING THE PRIVILEGES & IMMUNITIES ISSUE 6

C. THE RESIDENCE REQUIREMENT APPLICABLE TO OFFICERS, DIRECTORS, AND OWNERS OF RETAIL LIQUOR ESTABLISHMENTS VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE. 9

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 3, 14
Austin v. New Hampshire, 420 U.S. 656 (1975) .. 11
Baldwin v. Fish & Game Comm. of Montana, 436 U.S. 371 (1978) 10
Belleville Catering Co. v. Champaign Marketplace, LLC, 350 F.3d 691 (7th Cir. 2003) 7
Bernard v. Thorstenn, 489 U.S. 546 (1989) 1
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 6
Craig v. Boren, 429 U.S. 190 (1976) 3, 14
Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 3, 14
Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979) 1, 13
Hicklin v. Orbeck, 437 U.S. 518 (1978) 11, 13
Hughes v. Oklahoma, 441 U.S. 332 (1979) 12
Louisville, C. & C. R. Co. v. Letson, 43 U.S. 497 (1844) 7
Maine v. Taylor, 477 U.S. 131 (1986) 12
McBurney v. Young, 569 U.S. 221 (2013) 10
Mullaney v. Anderson, 342 U.S. 415 (1952) .. 8, 9, 10
Paul v. Virginia, 75 U.S. (8 Wall) 168 (1868) 7
Philadelphia v. New Jersey, 437 U.S. 617 (1978) 12
Supreme Court of New Hampshire v. Piper, 470 U.S. 284 (1985) 1
Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) 1, 3, 10

Toomer v. Whitsell, 334 U.S. 385 (1948) . 2, 9, 10, 11
United Building & Construction Trades Council v. Mayor & Council of the City of Camden, 465 U.S. 208 (1984) 3, 11
Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) 3, 10

Constitution

Dormant Commerce Clause ..... passim
Equal Protection Clause 3, 14
Export-Import Clause 3, 14
First Amendment 3, 14
Privileges and Immunities Clause, Article IV, § 2 ..... passim
Twenty-first Amendment ..... passim

Statutes

28 U.S.C. § 1332(c) 7
Tenn. Code Ann, § 57-3-204(b) 4, 5, 12

INTEREST OF AMICI CURIAE[1]

Amicus curiae Alan B. Morrison is an associate dean at the George Washington University Law School where he teaches constitutional law. He is submitting this brief to provide the Court with an alternative basis for affirming the judgment below: the Privileges & Immunities Clause of Article IV, section 2 of the Constitution, which prohibits the precise discrimination against non-residents that is being challenged in this case. In addition to his teaching and writing on that Clause, amicus has also been co-counsel for parties or amici in a number of cases before this and other courts in which that Clause formed the basis of decisions setting aside residence requirements like those at issue here. *See e.g. Supreme Court of New Hampshire v. Piper*, 470 U.S. 284 (1985); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Bernard v. Thorstenn*, 489 U.S. 546 (1989); and *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tennessee statute at issue in this case facially discriminates against non-residents who

---

[1]This brief is filed pursuant to blanket consents provided by all parties. No person other than amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

wish to enter the retail liquor business by imposing a two-year Tennessee residence requirement on them. If the business were any other than liquor, there would be no doubt that the requirement was unconstitutional under the Dormant Commerce Clause, as the lower courts held, or under the Privileges and Immunities Clause of Article IV, section 2 of the Constitution, as respondent Tennessee Fine Wines and Spirits, d/b/a Total Wine Spirits Beer & More ("Total Wine") argued below.

Amicus agrees with Total Wine that the challenged statute is not saved by the Twenty-first Amendment, as petitioner and the State contend. This brief will focus instead on the alternative Privileges & Immunities Clause to strike down the Tennessee residence requirement. Under that Clause, "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and it is undisputed that Total Wine is being denied the privilege of having a retail liquor license because its owners are citizens of Maryland and not Tennessee.[2]

Privileges & Immunities cases involving interstate discrimination frequently arise in the work context when non-residents seek to engage in a particular occupation, but are precluded from

---

[2] Although the Clause speaks in terms of the rights of "citizens," this Court has made it clear that it applies to discriminations based on residence as well. *Toomer v. Witsell*, 334 U.S. 385, 397 (1948).

doing so or are penalized because they are non-residents in one of three ways. First, state laws, like the one at issue here, make non-residents categorically ineligible to obtain the required license, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 284 (1984) (law), or make it more difficult to do so. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). In the second category are laws which impose license or other fees on non-residents that vastly exceed those charged to residents. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870) (retail goods). The third category requires hiring preferences for residents. *United Building & Construction Trades Council v. Mayor & Council of the City of Camden*, 465 U.S. 208 (1984)(construction work). Thus, there can be no doubt that the Privileges & Immunities Clause has an expansive reach that would surely include the liquor industry.

Petitioner reads the Twenty-first Amendment in an expansive manner to preclude Total Wine's Dormant Commerce Clause challenge. But it does not dispute that the Amendment does not override other explicit protections in the Constitution, such as the Equal Protection Clause, *Craig v. Boren*, 429 U.S. 190 (1976), the First Amendment, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), or the Export-Import Clause in Article I, section 10, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964). Because the Privileges & Immunities Clause, like all these other provisions, contains an express protection, there is no basis to

conclude that the Twenty-first Amendment has any more impact on its operation in the Privileges & Immunities context than it does for these other constitutional protections.

ARGUMENT

THE JUDGMENT BELOW SHOULD ALSO BE AFFIRMED ON THE ALTERNATIVE BASIS OF THE PRIVILEGES & IMMUNITIES CLAUSE.

A. THE OPERATIVE FACTS.

This case arose when Clayton Byrd, then Executive Director of the Tennessee Alcoholic Beverage Commission, whose successor Zackary W. Blair is formally a respondent in this Court, filed a declaratory judgment action in a state court in Tennessee asking the court to decide whether the various residency requirements in Tenn. Code Ann, § 57-3-204(b) violated the Dormant Commerce Clause. The lawsuit named as defendants the two license applicants with non-resident owners – respondents Total Wine and Affluere Investments Inc. ("Affleure") – and the local association of retail liquor store owners, the petitioner Tennessee Wine and Spirits Retailers Association (the "Association"), which supports the constitutionality of these residence restrictions. The Association removed the case to federal court, and Total Wine responded, contending that the statute violated both the Dormant Commerce and the Privileges & Immunities Clauses.

At that time, section 57-3-204(b) contained three separate residence rules: (1) Any individual who wished to obtain a liquor license had to have resided in Tennessee for two years; (2) If the applicant were a corporation (or other legal entity), the officers, directors, and *all* of the shareholders had to satisfy the two-year residence requirement; and (3) to obtain renewal of the one-year license, all of the covered persons had to have been Tennessee residents for *ten* years.

In the district court, Total Wine argued that all three requirements were unconstitutional under both the Dormant Commerce and Privileges & Immunities Clauses. The district court agreed on Commerce Clause grounds and did not reach the alternative basis. In the court of appeals, Total Wine focused its arguments on the Commerce Clause, while expressly preserving the Privileges & Immunities Clause argument.

The majority in the Sixth Circuit struck down all three challenged provisions. Judge Sutton concurred with the ruling on the ten-year renewal provision and the 100% of shareholder requirement, but dissented on the basic two-year rule for both individual proprietors and for officers and directors of corporations and controlling shareholders of corporations and other business entities.

In this Court, petitioner argues that the Dormant Commerce Clause has no bearing at all on what states can do in terms of regulating the

three tiers of liquor distribution: production, wholesale, and retail. But despite that broad claim, it no longer seeks to defend the 10-year rule for renewals or the application of a two-year residence requirement for all of a company's shareholders, even though the sole basis on which they were set aside is the Dormant Commerce Clause.

B. PROCEDURAL OBJECTIONS TO DECIDING THE PRIVILEGES & IMMUNITIES ISSUE.

Petitioner and respondent Blair are likely to raise two procedural objections to this Court ruling on the Privileges & Immunities issue. Neither of them is a proper basis for declining to decide that issue.

First, the issue was not decided by either court below, although it was briefed in the district court and preserved on appeal. The case was decided on summary judgment, with no suggestion that there were any facts in dispute on either of the claims of unconstitutionality. Although this Court does not generally pass on questions not decided below, as the Court observed in another Twenty-first Amendment case, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984), "this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts." The Court further observed that the barrier was less significant where the issue was raised in the pleadings and all relevant factual findings had been made. *Ibid.* And

if further briefing is needed, the Court can do what it did in *Capital Cities*: it can order the parties to brief the issue. *Ibid.*

Second, petitioner and the state argued in the lower courts that the Privileges & Immunities Clause applies only to "citizens," and because this Court held in *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1868), that citizens did not include corporations, the Clause does not protect Total Wine. Assuming that *Paul* is still good law, it does not eliminate the Privileges & Immunities objections to the residence law at issue here for at least two reasons.[3]

One, Total Wine is not a corporation, but rather was organized as a Tennessee LLC, and the federal courts have treated such entities differently because they are different. *Belleville Catering Co. v. Champaign Marketplace, LLC*, 350 F.3d 691, 692 (7th Cir. 2003). An LLC is comprised of members who are themselves citizens of a state, and so the formal "corporations are not citizens

---

[3] If a case should arise in which the decision may turn on the applicability of the Privileges & Immunities Clause to corporations, this Court should re-visit *Paul*. In *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 551 (1844), this Court rejected the proposition ""that a corporation in a state cannot be sued in the Circuit Courts of the United States, by a citizen of another state, unless all the members of the corporation are citizens of the state in which the suit is brought." Instead, it held that corporations can be "citizens" for diversity of citizenship purposes under Article III as they are today *See* 28 U.S.C. § 1332(c). Treating corporations as citizens under both constitutional provisions is entirely appropriate because the purpose of both is to protect non-residents from in-state biases.

because they cannot vote etc" objection does not apply to the members of an LLC or other artificial entities like partnerships and real estate investment trusts whose owners are citizens and stand in a different relation to the entity than do the shareholders of corporations.

Two, the discrimination here is directed at individuals who are citizens of states other than Tennessee and who, because they are denied the right to be owners of licenses for Tennessee retail liquor businesses, are directly injured by the Tennessee law at issue here. It is their personal right to own a Tennessee business that is at issue here, and the Privileges & Immunities Clause speaks directly to that claim and protects the rights of those individuals as citizens. When the state filed this action, it simply chose not to name the individual owners of Total Wine and the individual officers, directors, and shareholders of Affluere as defendants. But that decision does not eliminate the direct impact that the Tennessee law has on the rights of those individuals. Accordingly, it is entirely proper to decide this case on all of the grounds on which Total Wine has relied to protect its license application and the rights of its owners.

Furthermore, a similar objection to the standing of the respondents to raise a Privileges & Immunities claim was made in *Mullaney v. Anderson*, 342 U.S. 415 (1952). The respondents there were a union and its Secretary-Treasurer. They sought to represent individual union members who were non-residents of Alaska and who objected to the license fee that was ten times

as large for non-residents as for residents. To avoid having to decide the standing issue, the Court allowed respondents to amend the complaint to add two of their members as parties, *id.* at 416-17, and it then set aside the statute under the Privileges & Immunities Clause. Should the Court consider it necessary, that avenue is open here as well.

C. THE RESIDENCE REQUIREMENT APPLICABLE TO OFFICERS, DIRECTORS, AND OWNERS OF RETAIL LIQUOR ESTABLISHMENTS VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE.

The requirement that all officers, directors, and owners of retail liquor stores in Tennessee must have resided in the state for two years prior to the store receiving a license is a blatant form of discrimination against non-residents prohibited by the Privileges & Immunities Clause of Article IV, section 2 of the Constitution. Enacted as part of the original Constitution in 1787, this Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

The Clause does not operate to prevent states from making all distinctions between citizens and non-citizens in all areas of the law. Thus, the Court has recently upheld as outside the scope of the protections of the Clause the Virginia open records

statute that was available only for requests from its own citizens. *McBurney v. Young*, 569 U.S. 221 (2013). And the Court had previously rejected a claim of non-residents that the higher fees for big game licenses in Montana was a violation of that Clause. *Baldwin v. Fish & Game Comm. of Montana*, 436 U.S. 371 (1978). But the Court has never wavered in the application of the Clause to all forms of occupational restrictions based on residence.

Privileges & Immunities cases setting aside interstate discrimination regarding the opportunities for non-residents to engage in a lawful occupation on the same terms as residents arise in three different contexts. First are state laws, like those at issue in this case, totally precluding non-residents from obtaining a license to practice an occupation, most prominently the practice of law, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 284 (1985), *Barnard v. Thorstenn*, 489 U.S. 546 (1989), or making it more difficult to obtain the license, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).

In the second category are laws which cover occupations such as selling goods at retail, *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948), and commercial fishing, *Mullaney v. Anderson*, 342 U.S. 415 (1952), in which license fees for non-residents are many multiples of what residents are charged.

The third category, which requires hiring preferences for residents, has been applied in areas such as construction, *United Building & Construction Trades Council v. Mayor & Council of the City of Camden*, 465 U.S. 208 (1984), and the oil and gas industry, *Hicklin v. Orbeck*, 437 U.S. 518 (1978). *See also Austin v. New Hampshire*, 420 U.S. 656 (1975) (applying the Clause to overturn discriminatory income taxes for non-residents who work in the state). Thus, there can be no doubt that the Privileges & Immunities Clause has an expansive reach for those who seek to earn a living that would surely include the liquor industry.

There is another aspect of the Privileges & Immunities analysis, but it presents no obstacle to Total Wine in this case:

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.

Toomer, supra, 334 U.S. at 396. As the Court then explained that test, "the purpose of that clause, which, as indicated above, is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a *peculiar source of the evil at*

which the statute is aimed." Id. at 398 (emphasis added).

In this case, petitioner, the state, and their amici suggest a number of reasons why the ban on non-resident officers, directors, and owners is justified, but there is not a shred of evidence in the record to support those claims. In the district court petitioner and the state chose to present no evidence that non-residents are the source of any demonstrable "evil," let alone a "peculiar" source of it. Instead they relied on the self-serving justifications that the Tennessee legislature added to section 57-3-204(b)(4) in 2014, two years after the Tennessee Attorney General had formally ruled that the residency requirements were unconstitutional.

Under the Dormant Commerce Clause, in cases in which there is facial or intentional discrimination, and not simply a claim of an undue burden on interstate commerce, this Court has almost never upheld state laws on the ground that a valid state purpose justified such differential treatment. *See Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978) (applying "virtual *per se* rule of invalidity" to "a law that overtly blocks the flow of interstate commerce at a State's borders"); *Hughes v. Oklahoma,* 441 U.S. 322 (1979) (rejecting conservation justification); *but see Maine v. Taylor,* 477 U.S. 131 (1986) (upholding similar stated justification on special facts). Given "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause – a relationship that

stems from their common origin in the Fourth Article of the Articles of Confederation, and their shared vision of federalism," this Court has concluded that it is appropriate to look to Commerce Clause decisions in ruling on Privileges & Immunities claims. *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

As respondent Total Wine explains in argument I B of its merits brief, the reasons offered by petitioner and its supporters to justify the ban on non-residents in the liquor business cannot support the law, under either the Privileges & Immunities or Dormant Commerce Clauses. There is no legitimate regulatory purpose that Tennessee seeks to accomplish for which there are not non-discriminatory means of achieving its goals. Indeed, many of these proffered justifications reprise those made in bar admission residency cases. Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 274, 397 N.E.2d 1309, 1313 (1979) (rejecting justification based on "the need of Bar admission authorities to observe and evaluate the applicant's character").

The sole defense of Tennessee's residency requirements is that the Twenty-first Amendment gives the state a license to discriminate even if the discrimination otherwise violates the Constitution. Although some decisions have indicated that there are limited exceptions to the principles underlying the Dormant Commerce Clause based on that Amendment, no case has suggested that the Privileges & Immunities Clause is subject to a

similar limitation. Indeed, in the course of deciding what impact, if any, the Twenty-first Amendment has on other constitutional protections beyond the Commerce Clause, this Court has rejected every claim that its impact extends to other parts of the Constitution.

For example, in upholding the Equal Protection challenge involving gender discrimination in *Craig v. Boren*, 429 U.S. 190, 206 (1976), the Court stated that "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." And in a First Amendment challenge striking down Rhode Island's prohibitions on advertising the price of liquor sold at retail, the Court ruled that "the text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). Furthermore, in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344 (1964), the Court observed that it "has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids." Because the prohibition on interstate discrimination in the Privileges & Immunities Clause "precisely and explicitly forbids" what Tennessee has done here,

Total Wine's claim under that Clause is immune from attack based on the Twenty-first Amendment, no matter how that Amendment might impact a Dormant Commerce Clause claim.

Finally, petitioner has belatedly recognized that it cannot defend the provisions requiring ten-year residence to renew a license and the mandate that all owners of a corporation or similar business entity be Tennessee residents. But that recognition wholly undermines the argument made by petitioner and its amici that the Twenty-first Amendment eliminates all Dormant Commerce Clause challenges. If the Twenty-first Amendment argument had the potency that petitioner and its supporters claim, they would be defending the ten year and the 100% shareholder rules, rather than abandoning them and seeking to sever the officer, director, and owner rules.

There is no doubt why the defense of those now-abandoned rules could not be sustained, as even the dissenting Judge below found them to be wholly arbitrary and blatantly protectionist. But if, as petitioner claims, the Twenty-first Amendment precludes Dormant Commerce and Privileges & Immunities Clause challenges to the two-year residency rule for owners, officers, and directors, there is no principled reason why the deferential standard that petitioner proposes would not sustain the other even more protectionist rules as well. The only reasonable conclusion to be drawn is that the Twenty-first

Amendment does not authorize these kinds of discriminatory and protectionist laws in the liquor industry under the Privileges & Immunities Clause any more than it would in any other field of commerce.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below on the basis of both the Privileges & Immunities and the Dormant Commerce Clauses.

Respectfully Submitted,

Alan B. Morrison
George Washington University
Law School
2000 H Street NW
Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu
Counsel for the Amicus Curiae

December 12, 2018

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND NATIONAL LIQUOR LAW ENFORCEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

J. NEAL INSLEY
LARRY BUCKNER
NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION
4401 Ford Avenue
Suite 700
Alexandria, VA 22302-1473
(703) 578-4200
neal.insley@nabca.org

RACHEL BLOOMEKATZ
Counsel of Record
ALEXANDRIA TWINEM
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
rachel@guptawessler.com

Counsel for Amici Curiae

November 20, 2018

TABLE OF CONTENTS

Table of authorities iii
Introduction and interest of *amici curiae* 1
Background 3
I. Regulatory Structure 3
II. Alcohol Enforcement Agents 7
Summary of argument 11
Argument 13
I. In-state residency requirements are critical to states' efforts to enforce alcohol regulations for the health and safety of their citizenry. 13
A. Residency requirements ensure that agents can physically inspect licensees' premises and products. 14
B. In-state residency requirements facilitate enforcement actions for violations of state alcohol laws. 17
C. Residency requirements foster self-regulation through ties to the community and local pressure. 19
II. Eliminating in-state presence requirements would undermine the efficacy of the entire three-tier system of alcohol control. 21
A. The three-tier system provides an effective method for states to regulate alcohol within their borders. 22

B. Eliminating states' physical presence requirements would undermine the effectiveness of the three-tier system. 25

III. Durational residency requirements are even more potent in effectuating the goals of the three-tier system. 27

Conclusion 28

TABLE OF AUTHORITIES

Cases

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 2, 11, 13

Burnham v. Superior Court of California,
495 U.S. 604 (1990) 19

Duckworth v. Arkansas,
314 U.S. 390 (1941) 1

Family Winemakers of California v. Jenkins,
592 F.3d 1 (1st Cir. 2010) 24

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

North Dakota v. United States,
495 U.S. 423 (1990) 4, 5

Southern Wine & Spirits of America v. Division of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 19

Shaffer v. Heitner,
433 U.S. 186 (1977) 18

Statutes and regulations

Ala. Code § 28-5-10 14

Ala. Code § 28-7A-6 14

Alaska Stat. § 04.11.430 5

Ariz. Admin. Code R19-1-201 5

Ark. Code Ann. § 3-2-205 14

Ga. Code Ann. § 3-2-32 14

Ind. Code § 7.1-2-3-12 14

La. Stat. Ann. § 26:375 14

Mass. Gen. Laws Ann. Ch. 138, § 15 5

Md. Code Ann., Alco. Bev. § 6-202 14

Mo. Rev. Stat. §§ 311.490–311.540 14

N.C. Gen. Stat. Ann. § 18B-502 14

N.C. Gen. Stat. Ann. § 18B-900 5

N.D. Cent. Code § 5-03-01 5

N.H. Rev. Stat. Ann. § 177:16 5

Neb. Rev. Stat. Ann. § 53-125 5

R.I. Gen. Laws Ann. § 3-5-10 5

Tenn. Code Ann. § 57-3-203 6

Tenn. Code Ann. § 57-3-204 ..... 6, 14

Tenn. Code Ann. § 57-3-409 14

Texas Alco. Bev. Code Ann. § 101.04 14

Va. Code Ann. § 4.1-204 15

Legislative materials

Legal Issues Concerning State Alcohol Regulation: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary, 111th Cong. 43 (2010) 16

Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109-422, 120 Stat. 2890 (2006) 19

Other authorities

American Association of Wine Economists, Working Paper No. 61, *Direct Ship Blowout: How the Supreme Court's Granholm Decision Has Led to a Flood of Non-Taxed Wine Shipments* (June 2010) 26

The Beverage Information Group Handbook Advance (2011) 6

The Beverage Information Group Handbook Advance (2018) 6

Jack Broom, *NW Grocery Chain Pulls Four Loko Drinks off Shelves*, Seattle Times (Oct. 26, 2010) 21

Centers for Disease Control & Prevention, *Impaired Driving: Get the Facts* (2017) 8

Centers For Disease Control & Prevention, *Fact Sheets—Alcohol Use and Your Health* (Jan. 3, 2018) 1

Cowen, *Nielsen Spirits Update*, (Nov. 13, 2018) 6

Death Toll from Indonesia Tainted Liquor Rises to 82, Reuters (Apr. 11, 2018) 9

Jessica De Nova, *Business Owners Around Cancun Admit Tainted Alcohol Is an Ongoing Problem*, WFAA (ABC Dallas) (Dec. 7, 2017) 9

Roni Elias,
Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm,
14 DePaul Bus. & Com. L.J. 209 (2016) 23

Pamela Erickson,
Safe and Sound: How the Three-Tier Alcohol Regulatory System Promotes Safe Products and High Revenue Collections (Apr. 2015) 23, 24

Benjamin Fearnow,
Blackouts, Deaths at Mexican Resorts Prompt US State Department Investigation,
International Business Times (Dec. 13, 2017) 25

Raymond B. Fosdick & Albert L. Scott,
Toward Liquor Control (1933) 20

Pat Gagliardi,
The Need for State Alcohol Regulatory Funding: Fighting Deregulation by Defunding (2013) ..... *passim*

Sarah Kaplan,
Nearly 100 Die from Drinking Tainted Alcohol in Mumbai 'Hooch Tragedy', Washington Post (June 22, 2015) 25

Neil MacFarquhar,
Where the Booze Can Kill, and Putin Is Deemed a 'Good Czar', N.Y. Times (Feb. 18, 2017) 25

Benjamin Mueller,
Tainted Bootleg Alcohol Kills Dozens and Poisons Hundreds in Iran, New York Times (Oct. 2, 2018) 9

Matthew Reid,
Medford Liquor Stores Pull Four Loko from Shelves before Ban, Wicked Local (Nov. 24, 2010) 21

Moonshine Bust: Police Seize 67 Gallons from Alleged Bootlegger's Home, NBC Washington (Oct. 19, 2017) 9

More than 80 gallons of moonshine seized in Hancock County, Miss.: report, WGNO (ABC New Orleans) (June 28, 2018) 9

National Highway Traffic Safety Administration, Pub. No. 812 450, *Alcohol-Impaired Driving* (Oct. 2017) 8

National Highway Traffic Safety Administration, *The Role of Alcohol Beverage Control Agencies in the Enforcement and Adjudication of Alcohol Laws* (2005) 8, 15, 17

National Institute on Alcohol Abuse & Alcoholism, *Alcohol Facts and Statistics* (Aug. 2018) 1

César Rodriguez,
45 gallons of pulque seized in Laredo amid warning of tainted alcohol in Mexico, Laredo Morning Times (Aug. 8, 2017) 9

Bibeka Shrestha,
Boston Beer Gets $20.5M to Settle Recall Claims, Law 360 (May 10, 2011) 24

Jessica C. Starns,
The Dangers of Common Ownership in an Uncommon Industry: Alcohol Policy in America and the Timeless Relevance of Tied-House Restrictions (2017) 4

Scores of TGI Fridays Among New Jersey Bars Accused of Substituting Cheap Alcohol for Premium Brands in Statewide Crackdown,
Daily Mail (May 24, 2013) 15

Substance Abuse & Mental Health Services,
U.S. Department of Health & Human Services,
National Survey on Drug Use and Health: Comparison of 2008–2009 and 2015–2016 Population Percentages (2016) 8

Robert M. Tobiassen,
The "Fake Alcohol" Situation in the United States: The Impact of Culture, Market Economics, and the Current Regulatory System (2014) ..... *passim*

Virginia Department of Alcoholic Beverage Control, *Annual Report* (2017) 14

Wegmans Pulls Four Loko off Store Shelves,
Rochester First (Nov. 10, 2010) 21

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Alcohol is no ordinary product. It has an inherent dichotomy in its use. Consumed responsibly and properly regulated it can be safely enjoyed by adult consumers. However, it can also be "a lawlessness unto itself." *Duckworth v. Arkansas*, 314 U.S. 390, 398 (1941) (Jackson, J., concurring). Drinking causes more than 80,000 deaths each year, including the deaths of over 1,800 young people between the ages of 18 and 24. Alcohol consumption results in higher rates of accidental injury (and death); sexually transmitted disease; and interpersonal violence, including homicide, suicide, sexual assault, and domestic violence. Regular alcohol consumption can have long-term health consequences, such as high blood pressure, stroke, liver disease, cancer, cardiovascular disorders, and dementia. Altogether, the harmful effects of alcohol consumption cost the U.S. economy almost $250 billion annually. *See* Ctrs. For Disease Control & Prevention, *Fact Sheets—Alcohol Use and Your Health* (Jan. 3, 2018), https://perma.cc/N446-CASB; Nat'l Institute on Alcohol Abuse & Alcoholism, *Alcohol Facts and Statistics* (Aug. 2018), https://perma.cc/NH7F-SX48.

States are charged with the great responsibility, and daunting task, of regulating alcohol within their borders to protect the health and safety of their citizens from these very real threats that alcohol poses. Yet states must do so under profound constraints: The number of agents they can employ is dwarfed by the number of

---

[1] No counsel for a party authored this brief in whole or in part and no person other than amici and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of amicus briefs are on file with the Clerk.

companies involved in the alcohol trade. And alcohol oversight agencies have limited budgets to fund investigations into potential wrongdoing and enforcement actions to hold wrongdoers accountable. In light of this reality, states must pursue the most efficient method of overseeing the alcohol industry.

That is where residency requirements—and durational residency requirements—come in. Far from the type of protectionist policy the Dormant Commerce Clause targets, residency requirements are a critical tool of state regulation to "combat the perceived evils of an unrestricted traffic in liquor." *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984). Striking down such requirements would jeopardize the entire system of state regulation and oversight of the alcohol industry.

Amici here have a unique understanding of alcohol regulatory enforcement schemes and the critical role that residency and durational requirements play in furthering health and safety. The National Alcohol Beverage Control Association (NABCA) is an organization composed of government agents responsible for controlling and regulating the distribution and sale of alcoholic beverages in eighteen states throughout the country. As such, it is intimately acquainted with the realities of enforcing alcohol regulation within the United States and how best to effectuate the goals of maintaining an orderly alcohol market, ensuring product integrity, and promoting the states' interests in the health and safety of their citizens.

The National Liquor Law Enforcement Association (NLLEA) is a non-profit association comprised of approximately 1,100 law enforcement personnel dedicated to the enforcement of liquor laws and regulations. The NLLEA is committed to improving the standards and

practices of liquor law enforcement, the professional development of its members, and public recognition of the role and achievements of liquor law enforcement in protecting and promoting public safety. The NLLEA also collaborates with other state and national law enforcement organizations to enhance understanding of the overall importance liquor law enforcement plays in preventing crime and community problems.

Both the NABCA and NLLEA have a significant interest in this case because, as explained below, the elimination of residency requirements would prove catastrophic to the enforcement of state liquor regulations.

BACKGROUND

Tennessee did not enact the challenged licensing requirements in a vacuum. For nearly a century since Prohibition—and since the Twenty-first Amendment enshrined states' rights to regulate alcohol—states have had experience on the front lines of alcohol regulation. Tennessee, like many other states, adopted a durational residency requirement for alcohol licensees based on this experience regulating the flow of alcohol within its borders and in light of the very real financial and other practical constraints it faces in regulating this sui generis product.

I. Regulatory Structure

The Twenty-first Amendment grants to the states "virtually complete control" to regulate or prohibit the transportation and importation of alcohol within their borders in whatever manner they see fit. *Granholm v. Heald*, 544 U.S. 460, 488 (2005). Under the wide latitude granted by the Constitution, each state has developed its own regulatory system. While many features of these

systems vary by state, as a general matter, every state employs some version of what is known as the "three-tier system." *See* Jessica C. Starns, *The Dangers of Common Ownership in an Uncommon Industry: Alcohol Policy in America and the Timeless Relevance of Tied-House Restrictions* 8 (2017), https://perma.cc/A8TJ-CH68. The three-tier system is not a historical accident or a protectionist scheme; it is a deliberate design integral to a state's ability to effectively enforce its duly enacted alcohol laws.

Specifically, the three-tier system was developed in response to the dangers of the "tied-house" model that dominated the alcohol market prior to Prohibition. Under that model, the manufacturers of alcohol products could directly sell to consumers. That vertical integration of alcohol production and sale led to rampant oversupply of alcohol and disregard for alcohol regulations. *See id.* at 4–5, 8–9. With a direct line between the numerous suppliers and countless customers, there was little space for state regulators to intervene and enforce health and safety laws regulating alcohol.

Under the three-tier system, by contrast, alcohol travels through at least three independent levels of distribution before it is enjoyed by the ultimate customer. *See North Dakota v. United States*, 495 U.S. 423, 428 (1990) (describing North Dakota's three-tier system). The alcohol is produced by a manufacturer, such as a distiller, brewery, or winery. The manufacturer may only sell its alcohol to a state-licensed (or state-owned) wholesaler, also known as a distributor. The distributor may sell this alcohol to another licensed wholesaler, or it may sell it to a state-licensed (or state-owned) retailer. The retailer, in turn, is the only type of entity that may sell alcohol directly to the consumer. This Court has

recognized the three-tier system as "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432). Not only is it legal; it also provides myriad avenues for state regulators to ensure that the entire chain of alcohol production and distribution follows the state's health and safety regulations.

Within the three-tier system, states impose numerous restrictions on people and corporations who seek to enter the alcohol industry within their borders. For example, most states require background checks to determine whether the applicants can be trusted to exercise appropriate judgment as an alcohol distributor or purveyor. As part of this three-tier system, too, many states have instituted durational residency requirements on alcohol wholesalers and retailers. *See* Petition at 24 n.3 (listing at least 21 states with durational residency requirements). Other states have instituted in-state presence requirements without mandating a particular duration of in-state residency. *See, e.g.*, Alaska Stat. § 04.11.430; Ariz. Admin. Code R19-1-201; Mass. Gen. Laws Ann. Ch. 138, § 15; Neb. Rev. Stat. Ann. § 53-125; N.H. Rev. Stat. Ann. § 177:16; N.C. Gen. Stat. Ann. § 18B-900; N.D. Cent. Code § 5-03-01; R.I. Gen. Laws Ann. § 3-5-10. Under in-state presence requirements, any alcohol distributor or retailer applying to do business in a state must demonstrate that the person seeking the license (or, if a corporation, its owner or manager) is currently a resident of the state. *See, e.g.*, N.D. Cent. Code § 5-03-01; *see also North Dakota*, 495 U.S. at 447 (Scalia, J., concurring) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."). That is, producers of alcohol throughout the country—vineyards, distilleries, breweries, and the like—can only sell their products in a

given state by contracting with a licensed wholesaler that resides in the state. In turn, that wholesaler can only sell to retailers that reside in the state.

The durational residency requirements, like the one Tennessee instituted, just extend the in-state residency requirement by mandating that distributors and retailers applying to do business in a state demonstrate that the person seeking a license (or the corporation's managers or owners) has resided in the state for a certain period of time. *See, e.g.*, Tenn. Code Ann. §§ 57-3-203(b), -204(b)(2) (requiring two years of residency for both retail and wholesale licenses); *see also* Petition at 24 n.3 (collecting durational residency statutes).

Under the three-tier system of regulation, the alcohol industry has thrived across the fifty states. *See* Cowen, *Nielsen Spirits Update* (Nov. 13, 2018) (highlighting continued growth in spirits market). Over the past decade, gross sales of alcohol products have increased by almost 27%—from approximately $177 billion in 2006 to nearly $224 billion in 2016. *See The Beverage Information Group Handbook Advance* 39 (2018); *The Beverage Information Group Handbook Advance* 143 (2011). By preventing producers from owning retailers or striking anticompetitive deals for retailers to favor their products over their competitors, state alcohol markets remain competitive and offer a wide variety of products at a "wide range of prices from low priced economy to high priced super-premium." Robert M. Tobiassen, *The "Fake Alcohol" Situation in the United States: The Impact of Culture, Market Economics, and the Current Regulatory System* 32, 53–55 (2014), https://perma.cc/W7LE-UUJD.

II. Alcohol Enforcement Agents

While the three-tier system provides structural safeguards against unregulated and oversaturated alcohol markets, much of the day-to-day responsibility for protecting the health and safety of the public from alcohol consumption rests upon the state agencies—and individual agents—that must enforce the laws. In nearly all of the fifty states, alcohol control agents are tasked with ensuring that alcohol markets are orderly and that the state's alcohol laws are enforced to protect the health and safety of its citizens. Though responsibilities differ between jurisdictions, as a general matter, agents are responsible for enforcing the state's laws through inspections, investigations, and, if necessary, fining violators and seizing unsafe or illegal products. At the retail level, for example, agents inspect licensed premises and investigate allegations that these businesses are accepting fraudulent identification, serving intoxicated customers, or providing alcohol to underage patrons. Pat Gagliardi, *The Need for State Alcohol Regulatory Funding: Fighting Deregulation by Defunding* (2013), https://perma.cc/LEE7-VXA5.

Agents also enforce financial regulations on alcohol entities. They collect excise taxes, most often as alcohol passes through an in-state wholesaler. They also investigate hidden ownership cases. These may concern an alcohol producer that has secretly purchased, or made an exclusive deal with, an alcohol retailer, thereby reenacting the destructive "tied-house" model that states have regulated against since the end of Prohibition. Hidden ownership cases may also concern the use of alcohol industry members as fronts to launder money for criminal or terrorist organizations. *Id.*; Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage*

Control Agencies in the Enforcement and Adjudication of Alcohol Laws 4 (2005), https://perma.cc/489K-KLJK.

Agents are further tasked with issues not related to licensed alcohol establishments, which may include investigating unlicensed or "underground" alcohol purveyors, the production and sale of counterfeit alcohol or moonshine, and the manufacture and distribution of fraudulent identification cards. *Id.* at 4. In recent years, alcohol control agents in many states have also been tasked with enforcement related to other vice laws, such as underage tobacco sales, illegal gambling, prostitution, and illicit drugs. *Id.*; Gagliardi, *The Need for State Alcohol Regulatory Funding*.

As *amici* have witnessed first-hand, these state agents have helped achieve significant success in protecting the health and safety of Americans. Over the last decade, the national number of fatalities resulting from drunk driving has decreased nearly twenty percent. Nat'l Highway Traffic Safety Admin., Pub. No. 812 450, *Alcohol-Impaired Driving* 2 fig.1 (Oct. 2017), https://perma.cc/RJU6-Q4R9. Similarly, the CDC's data for 2014—the most recent available—shows that alcohol-impaired driving episodes are at an all-time low. Ctrs. for Disease Control & Prevention, *Impaired Driving: Get the Facts* (2017), https://perma.cc/X6GS-UFVF. The rate of underage drinking has also markedly decreased in the last ten years. Substance Abuse & Mental Health Servs., U.S. Dep't of Health & Human Servs., *National Survey on Drug Use and Health: Comparison of 2008–2009 and 2015–2016 Population Percentages* tbl.6 (2016), https://perma.cc/XRC5-358T.

And alcohol agents each year seize thousands of containers of homemade, counterfeit, tainted, or other potentially dangerous alcohol before it can be purchased

or ingested. *See, e.g.*, *More than 80 gallons of moonshine seized in Hancock County, Miss.: report*, WGNO (ABC New Orleans) (June 28, 2018), https://perma.cc/9SDR-QQGF; *Moonshine Bust: Police Seize 67 Gallons from Alleged Bootlegger's Home*, NBC Wash. (Oct. 19, 2017), https://perma.cc/48LG-DVDV; César Rodriguez, *45 gallons of pulque seized in Laredo amid warning of tainted alcohol in Mexico*, Laredo Morning Times (Aug. 8, 2017), https://perma.cc/6X89-RC33. Indeed, the United States is considered a global leader in preventing counterfeit alcohol from entering the stream of commerce. Tobiassen, *"Fake Alcohol" Situation*, at 7–8, 11–15, 32–50. Though Americans may take the safety and purity of their alcohol for granted, death and injuries related to tainted and counterfeit alcohol consumption are still a common occurrence in other countries around the world. *See, e.g.*, Benjamin Mueller, *Tainted Bootleg Alcohol Kills Dozens and Poisons Hundreds in Iran*, N.Y. Times (Oct. 2, 2018), https://nyti.ms/2PDa7xA; *Death Toll from Indonesia Tainted Liquor Rises to 82*, Reuters (Apr. 11, 2018), https://reut.rs/2KeVFFW; Jessica De Nova, *Business Owners Around Cancun Admit Tainted Alcohol Is an Ongoing Problem*, WFAA (ABC Dallas) (Dec. 7, 2017), https://perma.cc/TDZ7-X9PF.

The continued success of state alcohol control efforts, however, is far from certain. The capacity of state alcohol enforcement agencies is increasingly strained by expanding responsibilities that are not matched by increased funding or personnel. Between 2003 and 2013, the United States experienced an "enormous increase in the sale and consumption of alcohol." Gagliardi, *The Need for State Alcohol Regulatory Funding*. Yet thirty-two states reduced or kept constant the number of enforcement agents despite this explosion in work. *Id.*

During this same period, nearly half of all states also reduced their budget allocations for alcohol control, requiring each agent to do more with fewer resources. *Id.*

The result: alcohol enforcement agents are already unable to provide the type of oversight necessary to meet the expanding market. While in 2003 there was, on average, one agent for every 228 licensed premises, in 2013 the ratio grew to one agent to every 280. *Id.* Since 2013, that ratio has only gotten worse. The reduction in workforce not only means that each agent has less time to inspect, investigate, and provide oversight to licensed (and unlicensed) facilities, it also means that each alcohol agent must cover a greater geographic area. Each agent in Minnesota, for example, is now tasked with inspecting and investigating alcohol establishments covering an average territory of 28,000 miles. *Id.* Agents in eleven other states are also obligated to travel a thousand or more miles on average to review the licensees under their purview.[2] With diminishing numbers and proximity, agents no longer pose the deterrence they once did.

Furthermore, enforcement agents face new challenges arising from technology. Internet platforms such as Craigslist and Facebook Marketplace provide easily accessible and largely unregulated grey markets for the sale and resale of products. Unlicensed resellers utilize a wide range of websites to make sales and third-party delivery services to make deliveries—increasing

---

[2] Agents in Wyoming (22,000 miles), Missouri (13,000 miles), Nebraska (9,600 miles), Colorado (6,900 miles), New Mexico (5,900 miles), Kansas (4,000 miles), Oregon (2,600 miles), Wisconsin (2,000 miles), Tennessee (1,300 miles), Michigan (1,200 miles), and California (1,100 miles) all cover average territories of 1,000 or more miles. Gagliardi, *The Need for State Alcohol Regulatory Funding*.

the ease with which underage buyers can purchase alcohol over the internet. *Id.* And bad actors across the globe can utilize all of these avenues to sell counterfeit and potentially tainted product with complete anonymity.

Despite calls for states to increase the resources available to alcohol control agencies, *see, e.g.*, *id.*; Tobiassen, *"Fake Alcohol" Situation*, at 3, 7, 34, there has been little action from the states to increase funding or personnel within these departments. Thus, effective alcohol enforcement at the state level is dependent on agents being able to efficiently administer their responsibilities—and that often depends on states' in-state or durational residency requirements.

SUMMARY OF ARGUMENT

States possess nearly unbounded authority to regulate the flow of alcohol within their borders. Exercising this authority, they have concluded that they can best maintain orderly alcohol markets and promote the health and safety of their citizens by requiring alcohol distributors and retailers to reside within the state—often for one or two years—in order to do business there. These residency and durational residency requirements are no "mere economic protectionism" seeking to promote local industry over out-of-state alcohol purveyors. *Bacchus*, 468 U.S. at 276. Rather, states have determined over their almost century-long experience regulating alcohol markets that requiring distributors and retailers to maintain an in-state presence is critical to state enforcement of alcohol laws "enacted to combat the . . . evils of an unrestricted traffic in liquor." *Id.* Indeed, the states' broad right to regulate in this area means nothing if they cannot enforce those laws successfully.

Residency requirements (including durational residency requirements) facilitate state enforcement agencies' monitoring alcohol purveyors within the state and holding them accountable if they violate state law. *First*, in-state residency requirements ensure that alcohol agents can physically inspect the premises of licensees as well as their products. Such physical oversight is critical to detecting legal violations or safety issues with the alcohol being sold in the state. *Second*, in-state residency requirements guarantee that state alcohol agencies can enforce penalties against violators. Alcohol purveyors that reside within the state will be subject to the state court's personal jurisdiction and will have assets within the state that can be attached in an *in rem* proceeding to satisfy any judgment. *Third*, residency requirements subject alcohol distributors and retailers to both the negative externalities that aggressive alcohol sales create and social pressure from the community to promote moderation. These forces cause alcohol purveyors to self-police, lessening the oversight burden on already-overloaded state agents.

Residency requirements also substantially contribute to the effectiveness of the three-tier system that has been adopted by almost every state. *First*, requiring wholesalers and retailers to maintain an in-state presence facilitates close business ties and regular in-person interactions at the retailer's establishment. This tight relationship allows both parties to detect and report violations of state law and assist their business partners in complying with the state's requirements. Physically visiting the retailer's premises also makes it more likely that one of the parties will detect any unlicensed, illegal, or counterfeit alcohol before it enters the stream of commerce. *Second*, requiring distributors to reside within a state and sell exclusively to retailers in

the state limits the number of wholesalers the market can sustain. The relatively minor number of wholesalers through which all alcohol in the state passes provides an efficient access point to inspect products and transaction records, collect excise taxes, and track any dangerous product if a flaw or contaminant is discovered. Absent residency requirements, the three-tier system would become diffuse and unwieldy, undermining much of what has made it so appealing to state regulators.

In sum, states' purpose in enacting residency requirements for alcohol purveyors was to ensure that each state could successfully enforce its laws, which are designed to vindicate the "clear concern[s] of the Twenty-first Amendment," *Bacchus*, 468 U.S. at 276, including keeping alcohol out of the hands of children, preventing the overserving of liquor to inebriated patrons, protecting consumers from tainted or counterfeit product, and curbing the availability of alcohol to promote moderation. These laws are thus protected under the Twenty-first Amendment or, at the least, advance "legitimate local purpose[s] that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489. Therefore, the judgment of the Sixth Circuit should be reversed.

ARGUMENT

I. In-state residency requirements are critical to states' efforts to enforce alcohol regulations for the health and safety of their citizenry.

State laws requiring alcohol retailers and wholesalers to maintain an in-state presence are an effective means by which overburdened state agents can protect the health and safety of the state's population. In-state presence requirements facilitate enforcement in three ways: they (1) enable state alcohol enforcement officers

to physically inspect alcohol wholesalers and retailers operating in the state; (2) guarantee that agents can enforce the law against such wholesalers and retailers; and (3) reduce noncompliance by fostering ties between licensees and the community in which they operate.

A. Residency requirements ensure that agents can physically inspect licensees' premises and products.

The importance of in-state residency requirements for effective inspection of licensees' premises and products is a matter of basic geography. Quite simply, state alcohol enforcement agents cannot travel around the country inspecting wholesalers or retailers—certainly not on their budgets.

The laws of nearly every state authorize state alcohol enforcement agents to inspect the premises and books of alcohol manufacturers, wholesalers, and retailers located within the state. *See, e.g.*, Ala. Code §§ 28-5-10, 28-7A-6; Ark. Code Ann. § 3-2-205; Ga. Code Ann. § 3-2-32; Ind. Code § 7.1-2-3-12; La. Stat. Ann. § 26:375; Md. Code Ann., Alco. Bev. § 6-202; Mo. Rev. Stat. §§ 311.490–311.540; N.C. Gen. Stat. Ann. § 18B-502; Tenn. Code Ann. §§ 57-3-204(b)(4), -409; Texas Alco. Bev. Code Ann. § 101.04; Va. Code Ann. § 4.1-204. Agents regularly visit the premises of licensed entities to ensure that they are complying with the state's applicable laws. Virginia enforcement officers, for example, spent 70% of their time in 2017 on "regulatory compliance," consisting of "conducting background investigations, license suitability and inspections of licensed establishments." Va. Dep't of Alcoholic Beverage Control, *Annual Report* 8 (2017), https://perma.cc/B2UC-C8GX. Agents there conducted 12,446 inspections of licensed establishments, 752 additional observations of licensed establishments, and

3,829 compliance checks regarding underage buyers last year. *Id.*

These inspections are the lynchpin of enforcing state alcohol regulations: research suggests that "the effectiveness of alcohol control policies depends heavily on the 'intensity of implementation and enforcement and on the degree to which the intended targets are aware of both the policy and its enforcement.'" Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 4 (citation omitted). They also uncover major wrongdoing that jeopardizes the health and safety of state residents. Enforcement agents in New Jersey, for example, conducted a yearlong undercover investigation in 2013 known as Operation Swill, in which they determined that twenty-nine bars and restaurants in the state were selling "scotch" that actually consisted of rubbing alcohol and caramel coloring and other brands of spirits that had been diluted with contaminated water. *Scores of TGI Fridays Among New Jersey Bars Accused of Substituting Cheap Alcohol for Premium Brands in Statewide Crackdown*, Daily Mail (May 24, 2013), https://dailym.ai/2Q5Jela.

And these inspections would be impossible if wholesalers and retailers were authorized to do business in foreign states. Even if they were allowed to do so, state agents who are already overburdened trying to oversee hundreds of licensees within the state do not have the time to travel to foreign states to do inspections. Nor do already cash-strapped state alcohol control agencies have the financial resources to fund such interstate travel by their officers. As one state regulator testified before Congress:

> Michigan uses its limited resources . . . to verify that Michigan's regulatory system is being

> followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underage persons and that taxes are being paid. Michigan simply does not have the ability or financial resources to effectively regulate hundreds of thousands of out-of-state retailers to ensure they are not selling to minors and to ensure that they are paying taxes and only selling products approved by the Commission.

Legal Issues Concerning State Alcohol Regulation: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary, 111th Cong. 43 (2010) (statement of Nida Samona, Chairperson, Mich. Liquor Control Commission).

State agents would also find themselves unable to keep up with the sheer number of establishments for which they would be responsible. If every existing wholesaler or retailer could operate in all fifty states, each agent would be responsible for as many as fifty times the number of licensees they currently oversee. As an example of this system's impracticality, consider Wyoming, which currently employs three state agents to ensure compliance with state alcohol law. Gagliardi, *The Need for State Alcohol Regulatory Funding*. There are approximately 570,000 licensed alcohol producers, distributors, and retailers in the United States. *Id.* It would be impossible for Wyoming's three agents to monitor every distributor and retailer that might occasionally distribute or sell alcohol in Wyoming, even if that number was only 1% of all distributors and retailers in the country.

B. In-state residency requirements facilitate enforcement actions for violations of state alcohol laws.

Requiring alcohol distributors and wholesalers to have an in-state presence ensures that enforcement agencies have jurisdiction to hold these entities responsible for violations of the state's alcohol laws—particularly with *in rem* actions. Adjudication of such violations is necessary to deter future wrongdoing by licensees and preserve the functioning of the state's alcohol regulatory system. *See* Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 7. The Sixth Circuit's decision erodes that enforcement power.

For state alcohol laws to effectively protect against health and safety risks, state regulators need to be able to impose penalties on violators—and in-state presence ensures that the state can collect on fines and other monetary penalties imposed by the courts. When enforcing alcohol laws, state agents regularly seek to impose fines, payment of outstanding taxes, and disgorgement of illicit profits made within the state. *See, e.g.*, Am. Complaint ¶¶ 37–44, *Hood v. Wine Express, Inc.*, No. 17-cv-2064 (Miss. Chancery Ct. Feb. 1, 2018), Dkt. No. 14; *see also* Tobiassen, *"Fake Alcohol" Situation*, at 7. These financial penalties deter future violations of alcohol control laws by ensuring that "the costs of violating the law significantly outweigh the benefits obtained." Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 7.

Critically, if distributors and wholesalers are required to be present within the state, these entities necessarily have assets that can be attached by enforcement agents in an *in rem* proceeding. *See Shaffer*

v. Heitner, 433 U.S. 186, 207 (1977). That is a serious threat. Some violators may tolerate fines as a cost of doing business, others may attempt to evade fines by just deciding not to pay them, forcing the state to endure endless attempts to collect. The power to attach physical assets adds critical muscle to overburdened state enforcement agencies. But without in-state residency, *in rem* actions are not possible. *Shaffer*, 433 U.S. at 207. The upshot: Absent a presence requirement, the state's alcohol enforcement regime would be largely toothless.

Furthermore, requiring that licensees have a presence in the state obviates questions regarding personal jurisdiction and long-arm statutes. Consider a recent case where a state sought to enforce its alcohol laws against an out-of-state entity—the matter was dismissed for lack of jurisdiction. In *Hood v. Wine Express, Inc.*, Mississippi enforcement agents brought an enforcement action against several out-of-state alcohol retailers that had shipped alcohol into the state without the required licenses, including shipments to dry counties and to underage customers. Am. Complaint ¶¶ 12–28, 34, *Hood v. Wine Express, Inc.*, No. 17-cv-2064 (Miss. Chancery Ct. Feb. 1, 2018), Dkt. No. 14. The chancery court dismissed the action, concluding that it lacked personal jurisdiction over any of the out-of-state retailers. Corrected Final Judgment, *Hood*, No. 17-cv-2064 (Sept. 4, 2018), Dkt. No. 59.

This issue has not arisen frequently because most alcohol distributors and retailers follow in-state presence requirements, thus ensuring states have jurisdiction to enforce their laws. *See* Tobiassen, *"Fake Alcohol" Situation*, at 3, 6–7. If, however, states could no longer require licensees to be present in the state, *all* alcohol purveyors in the state could potentially place themselves

beyond the reach of enforcement agencies, thus allowing them to flout state liquor laws. At the very least, requiring entities to have a physical in-state presence allows state attorneys to establish the court's personal jurisdiction and authority under long-arm statutes without having to invest time and money in extensively litigating the issue. *See, e.g., Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

C. Residency requirements foster self-regulation through ties to the community and local pressure.

In-state presence requirements also promote orderly markets by ensuring that wholesalers and retailers are subject to any negative externalities related to alcohol consumption occurring in the communities they serve. Congress has recognized that alcohol "is a unique product" that "should be regulated differently than other products by the States and Federal Government." Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109-422, § 2, 120 Stat. 2890, 2891 (2006). Unlike other products, the sale of alcohol subjects the surrounding community to "negative externalities," including "drunk driving, domestic abuse, [and] underage drinking." *S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013).

One pernicious feature of the "tied-house" system that preceded Prohibition was that alcohol purveyors did not live in the communities in which they sold their products. "The manufacturer knew nothing and cared nothing about the community. All he wanted was

increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 43 (1933). And under the old system, that manufacturer could sell directly to the consumer or retailer yet stay far from the eye of the local community.

In modern alcohol regulatory systems, states require that alcohol wholesalers and retailers reside in the state so that they will experience any negative externalities they create by selling alcohol in the community. For example, alcohol retailers live near those to whom they sell alcohol and drive on the same streets as their establishment's patrons. They pay taxes and vote in the same location as their customers, aligning their interests in maintaining the public health and safety of the community. In theory, wholesalers and retailers will balance these concerns against their profit motive when deciding what to sell, to whom, and in what quantity. In addition, in-state presence requirements subject retailers to local social pressure if they engage in undesirable behavior such as overserving intoxicated customers, failing to adequately prevent underage drinking, or otherwise failing to run a safe and orderly establishment. *See* Tobiassen, *"Fake Alcohol" Situation*, at 7; *see also Granholm*, 544 U.S. at 523–24 (Thomas, J., dissenting) ("Presence ensures accountability.").

Consider the example of Four Loko, a notorious line of caffeinated alcoholic beverages that became popular on college campuses between 2005 and 2010. Colleges and universities began to identify a rash of student hospitalizations due to injuries and blackouts resulting from the misuse of Four Loko. As a result, in 2010, these educational institutions urged students to avoid Four Loko and, in some cases, banned the drinks from

campus. In response, a host of national and local retailers voluntarily stopped selling the beverages. *See* Matthew Reid, *Medford Liquor Stores Pull Four Loko from Shelves before Ban*, Wicked Local (Nov. 24, 2010), https://bit.ly/2TlE9Uy; *Wegmans Pulls Four Loko off Store Shelves*, Rochester First (Nov. 10, 2010), https://bit.ly/2KiePdS; Jack Broom, *NW Grocery Chain Pulls Four Loko Drinks off Shelves*, Seattle Times (Oct. 26, 2010), https://perma.cc/N5PZ-LTS8. When distributors and retailers live in the community they service, they see first-hand the damage that they cause by selling dangerous products like Four Loko. Retailers had to confront the reality that youth in their own neighborhoods were going to the hospital because of the dangerous products they sold. These same retailers also faced mounting pressure from universities and other groups of concerned adults in the community. Together, these forces caused retailers to self-regulate before states or the federal government could pass formal regulations.

Due to the burdens placed on state alcohol enforcement agents, in-state presence requirements are critical to maintaining an effective and orderly system of alcohol regulation.

II. Eliminating in-state presence requirements would undermine the efficacy of the entire three-tier system of alcohol control.

Adopting the Sixth Circuit majority's position here would undermine alcohol enforcement in another way: it would erode the three-tier system altogether. The three-tier system has effectively regulated alcohol across the fifty states since the end of Prohibition. It has ensured consumer safety, resulted in the efficient collection of tax revenue for the state and federal government, created

diverse alcohol markets, and promoted moderate consumption among the population. In-state presence requirements—particularly for alcohol wholesalers—are critical to maintaining a functional three-tier system. Eliminating these requirements would threaten the alcohol regulatory systems that have provided safe and stable alcohol markets in the United States for more than a generation.

A. The three-tier system provides an effective method for states to regulate alcohol within their borders.

The three-tier system of alcohol regulation developed by the states has proven tremendously effective in securing orderly markets and promoting the health and safety of the community. Two features of the system particularly contribute to its success in facilitating health and safety enforcement: (1) it requires that alcohol move through multiple independent entities, allowing each level to provide a check on the other tiers, and (2) because the number of wholesalers remains relatively small, it allows states to use the wholesale level as a checkpoint for enforcement measures.

First, the three-tier system fosters compliance with state alcohol laws by creating three independent levels of distribution that regularly interact with each other in the course of business. And because each entity is subject to regulation and inspection by state agents, these tiers help police the compliance of the other levels. As both *amici* and independent scholars have recognized, "private actors at each of the three tiers have significant incentives to assure that their business partners in the other tiers adhere to regulations," and "the day-to-day contact with [their business partners] . . . enable[s] them to identify and address any compliance problems." Roni

Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DePaul Bus. & Com. L.J. 209, 219–20 (2015). For example, wholesalers help ensure that retailers are not selling counterfeit alcohol or alcohol purchased from a non-licensed wholesaler: "Because licensed distributors visit licensed retailers regularly, they notice a product that they did not supply." Pamela Erickson, *Safe and Sound: How the Three-Tier Alcohol Regulatory System Promotes Safe Products and High Revenue Collections* (Apr. 2015), https://perma.cc/9M5M-A6EP. Conversely, "a distributor is unlikely to jeopardize its license by offering a fake product to a licensed retailer." *Id.* And because both entities are obligated to report any violations they see committed by another licensed entity, violations are brought to enforcement agents without expending significant state resources.

This mechanism of self-regulation is especially important given that state agencies do not always have the resources to provide frequent inspections. Without the separate tiers checking one another, and with the knowledge that state regulators might not make rounds for months (or even a year), alcohol purveyors have much more leeway to violate state law with impunity.

Second, because the number of licensed distributors/wholesalers in each state remains relatively small, they provide an ideal access point for regulators to control the flow of alcoholic beverages, collect excise taxes, monitor compliance with regulations, and quarantine any tainted or otherwise-dangerous alcohol to prevent it from becoming available to consumers. "The structure of the usual three-tier system is commonly described as an hourglass, with wholesalers at the constriction point." *Family Winemakers of Cal. v.*

Jenkins, 592 F.3d 1, 5 (1st Cir. 2010). Wholesalers purchase alcohol from various suppliers around the world, transport and possess the alcohol in their home state, then sell the alcohol to numerous local retailers. Because wholesalers trade in large volumes of alcohol, the number that can exist in each state alcohol market is much smaller than the number of producers or retailers present in that state. As a result, enforcement agents can most effectively monitor the flow of alcohol through the relatively few wholesalers in the state and collect taxes on each transaction by reviewing these wholesalers' records. *See* Erickson, *Safe and Sound*.

In addition, the small number of distributors allows producers and state regulators to quickly identify, track, and quarantine tainted or counterfeit products at these locations more efficiently than attempting to locate products at every retailer in a given state. In 2008, Boston Beer Company Inc. recalled nearly one million cases of Samuel Adams beer after it discovered a defect in the bottle that could cause small pieces of glass to break off and fall into the beer. Bibeka Shrestha, *Boston Beer Gets $20.5M to Settle Recall Claims*, Law 360 (May 10, 2011), https://perma.cc/3FN2-8WT4. The company publicly stated that no injuries were reported to them. *Id.* When such recalls—voluntary or involuntary—occur, manufacturers rely on their suppliers to handle the local logistics of finding, acquiring, and quarantining potentially dangerous products. Because of their centralized nature, distributors are able to quickly determine where dangerous products have been sent and prevent them from being sold to consumers. By contrast, in numerous other countries not employing the three-tiered system, deaths and injuries from tainted and counterfeit products are common. *See, e.g.*, Benjamin Fearnow, *Blackouts, Deaths at Mexican Resorts Prompt US State*

Department Investigation, Int'l Bus. Times (Dec. 13, 2017), https://perma.cc/YT8G-V5L3; Neil MacFarquhar, *Where the Booze Can Kill, and Putin Is Deemed a 'Good Czar'*, N.Y. Times (Feb. 18, 2017), https://nyti.ms/2lWCxDe; Sarah Kaplan, *Nearly 100 Die from Drinking Tainted Alcohol in Mumbai 'Hooch Tragedy,'* Wash. Post (June 22, 2015), https://wapo.st/2A4yTf7. The security risks are real, and the three-tier system allows regulators to act quickly, without having to go to hundreds of retailers to enforce state laws; instead, they can cut off problems at the wholesaler.

B. Eliminating states' physical presence requirements would undermine the effectiveness of the three-tier system.

If states could no longer require alcohol distributors and retailers to be physically present in the state in order to do business there, many of the three-tier system's benefits would be lost.

First, the check that each tier of the system of distribution provides on the others would be reduced, if not eliminated entirely. If wholesalers and retailers could be located in separate states, wholesalers would no longer regularly visit retailers' premises, compromising their ability to detect the presence of alcohol that had come from unknown, perhaps unlicensed, sources. In a national marketplace, each retailer might do business with hundreds of wholesalers and each wholesaler with thousands of retailers. In this system, neither party would be familiar enough with the business operations of the other to detect the other's violations of state law. Nor would they necessarily be familiar with the other's state laws. Such a diffuse system would make it easier for bad actors to sell counterfeit or tainted alcohol to retailers,

secure in the knowledge that it would be unlikely to be detected by state agents or traced back to them among all of the distributors supplying a particular retailer.

Second, eliminating in-state presence requirements would massively expand the number of wholesalers operating in each state. The number of retailers in the state would no longer limit the number of distributors able to operate because each distributor could sell in large quantities to retailers in other states. As a result, the distributor level of the three-tier system would no longer act as the narrowing point in the "hourglass," and it would no longer provide an efficient point in the alcohol distribution system to inspect products or collect taxes.

This effect is already apparent due to interstate shipping of alcohol. When alcohol is shipped from producers to consumers rather than going through the clearinghouse of the wholesaler, it becomes more difficult for enforcement agents to track each sale to ensure excise tax is paid. In 2008, nearly 9.6% of wine sales were shipped without excise tax ever collected. Am. Assoc. of Wine Economists, *Direct Ship Blowout: How the Supreme Court's Granholm Decision Has Led to a Flood of Non-Taxed Wine Shipments* 21 (Working Paper No. 61, June 2010), http://njlsa.com/AAWE.pdf. If alcohol comes into a state through hundreds or thousands of different wholesalers from around the country (or even the world), it will be impossible for state agents to review the records of each distributor to ensure that excise tax on each transaction has been collected. Nor could agents confirm that each transaction has been conducted in accordance with state law.

This Court has held that the three-tier system is "unquestionably legitimate." *Granholm*, 544 U.S. at 489.

But eliminating in-state and attendant durational residency requirements would strike at its heart. If this Court were to adopt the Sixth Circuit's position, the three-tier system would lose much of the effectiveness that has caused it to persist for decades.

III. Durational residency requirements are even more potent in effectuating the goals of the three-tier system.

As described above, state laws requiring that alcohol distributors and retailers reside within the state ensure that states can maintain orderly alcohol markets and protect the health and safety of their residents. Durational residency requirements, like the one adopted by Tennessee and at least 20 other states, are a further extension of those regulations, and they provide several additional benefits that make such regulation even more effective. That is, in-state requirements are not protectionist policies; they are policies meant to protect the health and welfare of a state's inhabitants. And durational residency requirements just further those protections.

For example, consider the value in-state requirements provide by allowing state enforcement through *in rem* actions. By requiring persons interested in obtaining alcohol licenses to live within the state for a certain period of time, states increase the likelihood that the person or corporation will acquire assets (and significant assets) within the state. Such assets may then be attached as part of an *in rem* enforcement action against the person or entity if it violates state law.

Consider too the value of community ties and local pressure for self-regulation within the industry facilitated by in-state residency. Laws requiring that wholesalers and retailers live in the state for a number of

years make it even more likely that licensees have established strong ties to the community, which makes it more probable that these entities will be cognizant of the negative externalities alcohol sales can cause in the community. Entities will likewise be susceptible to social pressure from community members. Retailers subject to durational-residency requirements are thus more likely to promote moderation above sales, thereby fulfilling the primary goal of the three-tier system.

For these reasons, durational residency requirements provide the strongest method of fulfilling states' purposes of maintaining orderly alcohol markets while promoting the safety and health of citizens.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

RACHEL BLOOMEKATZ
Counsel of Record
ALEXANDRIA TWINEM
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
rachel@guptawessler.com

J. NEAL INSLEY
LARRY BUCKNER
NATIONAL ALCOHOL BEVERAGE
CONTROL ASSOCIATION
4401 Ford Avenue, Suite 700
Alexandria, VA 22302-1473
(703) 578-4200
neal.insley@nabca.org

November 20, 2018 *Counsel for Amici Curiae*

No. 18-96

In the
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, Interim Director of the Tennessee Alcoholic Beverage Commission, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF WINE RETAILERS IN SUPPORT OF RESPONDENTS

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
LAURA WOLK
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com
Counsel for Amicus Curiae

December 20, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST 1
SUMMARY OF THE ARGUMENT 3
ARGUMENT 6
I. This Case Has Profound Implications For The Interstate And Foreign Wine Markets 6
II. Petitioners' Theory Would Produce Results At Odds With The Original Meaning And Purposes Of The Commerce Clause 11
A. Confining Commerce Clause Protections to Laws that Regulate Wine *Producers* Flips the Commerce Clause on its Head ... 12
B. Petitioners' Theory Would Distinctly Disadvantage Foreign Commerce 18
III. The History Of The Twenty-first Amendment Does Not Support The Artificial Distinction Petitioners Advance 21
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Bacchus Imps. v. Dias,
468 U.S. 263 (1984) 17

Brennen v. S. Express Co.,
90 S.E. 402 (S.C. 1916) 23

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000) 22

Brown v. Maryland,
25 U.S. (12 Wheat.) 419 (1827) 18

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

James Clark Distilling Co. v. W. Md. Ry. Co.,
242 U.S. 311 (1917) 23

Kidd v. Pearson,
128 U.S. 1 (1888) 4, 15, 16

Larkin v. Grendel's Den, Inc.,
459 U.S. 116 (1982) 5

Lebamoff Enters., Inc. v. Rauner,
909 F.3d 847 (7th Cir. 2018) 3, 9, 17

Lebamoff Enters., Inc. v. Snyder,
--- F. Supp. 3d ---,
2018 WL 4679612 (E.D. Mich. 2018 9

Leisy v. Hardin,
135 U.S. 100 (1890) 4, 15, 16

New Energy Co. of Ind. v. Limbach,
486 U.S. 269 (1988) 13

Okla. Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 18

Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994) 13

Rhodes v. Iowa, 170 U.S. 412 (1898) 21

Scott v. Donald, 165 U.S. 58 (1897) 23

South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) 9

United States v. Lopez, 514 U.S. 549 (1995) 14, 17

Walling v. Michigan, 116 U.S. 446 (1886) 21, 22

Constitutional Provisions

U.S. Const. art. I, §8 ..... 12, 19

U.S. Const. amend XXI, §2 24

Statutes

27 U.S.C. §121 22

27 U.S.C. §122 22

Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) 22, 24

Wilson Act, ch. 728, 26 Stat. 313 (1890) 22, 23

Other Authorities

Alex Koral, *Direct-To-Consumer Shipping: Where is Retailer DTC Still Permitted?*, ShipCompliant, Nov. 28, 2017, https://bit.ly/2BynTXE 9

Ben O'Donnell, *In Courthouses and State Capitols, Wine Retailers Are Fighting for Direct Shipping*, Wine Spectator, Feb. 2, 2018, https://bit.ly/2AQA8z5 8

Emma Balter, *Wine Lovers Face Increasing Hurdles Ordering Online*, Wine Spectator, Feb. 1, 2018, https://bit.ly/2zLWGBh..... 10

Eric Asimov, *Why Can't You Find That Wine?*, N.Y. Times, Feb. 11, 2014, https://nyti.ms/2E1o0OX 7

Eric Asimov, *Wines Are No Longer Free to Travel Across State Lines*, N.Y. Times, Oct. 23, 2017, https://nyti.ms/2i0Ifjb..... 8

Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine (Barriers to E-Commerce)* (July 2003), https://bit.ly/2RBmVS1..... 6, 8

James Madison, *The Writings of James Madison 1783-1787* (G.P. Putnam's Sons 1901)..... 18

Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003)..... 15

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) 15

The Federalist No. 4 (J. Jay) (Charles R. Kesler ed., 1961)..... 19

The Federalist No. 22 (A. Hamilton) (Charles R. Kesler ed., 1961)..... 18

STATEMENT OF INTEREST[1]

The National Association of Wine Retailers (NAWR) is an association that represents and promotes the unique interests of wine sellers nationwide. Through advocacy, education, and research, NAWR seeks to expand the opportunities for America's wine retailers, whether they serve the wine-buying public via small brick-and-mortar establishments, large retail chains, Internet-based businesses, grocery stores, auction houses, or clubs. NAWR seeks to unite and serve wine retailing interests by providing essential services, strategic advocacy, and calls to action that will lead to a stable and modernized environment for wine retailing.

Unfortunately, arbitrary and archaic laws and regulations built for an era that decidedly no longer exists not only hamper wine retailers' abilities to access modern and growing marketplaces locally and nationally, but also hamper consumer choice and customers' ability to access the robust retail market that NAWR's members seek to foster. Too often, moreover, these measures serve only to protect local commercial interests while hindering consumers' interests in a diverse and thriving retail market for wine. It is thus a core part of NAWR's mission to work to overcome arbitrary, archaic, and protectionist

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

market access and distribution laws to create a fair and level playing field where wine retailers can legally respond to customer demand.

The position petitioners advance in this case runs directly counter to NAWR's mission. *Granholm v. Heald*, 544 U.S. 460 (2005), was a landmark decision that reaffirmed that nothing in the Twenty-first Amendment licenses states to engage in discrimination against out-of-state interests. Yet if petitioners' position is embraced, states will have free rein to close their borders to out-of-state retailers and the diverse array of wine that they offer consumers, no matter how blatantly protectionist the motives. Nothing in the logic of *Granholm*, the Commerce Clause, or the Twenty-first Amendment justifies protecting producers, but not retailers, from discrimination. Indeed, petitioners' effort to limit *Granholm* to producers gets matters exactly backward from a constitutional perspective.

Petitioners' position also would have a devastating impact on the wine industry and consumer choice. Allowing the further proliferation of protectionist state liquor laws would serve only to further reduce consumer choice, relegating consumers to large-production wines well suited to the traditional distribution system. The ability of consumers to purchase small-production wines, wines from back vintages, or wines from emerging producers would suffer. Construing *Granholm* to favor producers, but not retailers, also would have the perverse result of skewing the wine market in favor of domestic wine, as small foreign vineyards are unlikely to be able to get their wine to domestic consumers if they cannot utilize

specialty retailers to do so. The resulting discrimination against foreign commerce would be particularly antithetical to the Framers' concerns about protecting commerce from state protectionism. NAWR thus files this brief to explain why petitioners' position not only makes little sense as a policy matter, but would produce results fundamentally at odds with the Constitution.

SUMMARY OF THE ARGUMENT

This case arises in the context of an effort to impose an exceedingly stringent—indeed, downright bizarre—durational-residency requirement on a retailer's ability to obtain a liquor license in Tennessee. But the case has the potential to have ramifications far beyond that context. Relying on much the same reasoning that petitioners advance here, states have passed increasingly stringent restrictions not just on who may sell alcoholic beverages *within* their borders, but on who may engage in *interstate* commerce in wine with their residents. In particular, while this Court's landmark decision in *Granholm v. Heald* has led most states to lift blatantly discriminatory laws against out-of-state *producers* and allowed them to sell and ship liquor directly to in-state consumers, an ever-increasing number of states have prevented out-of-state *retailers* from doing the same. Those states have done so, moreover, while permitting their own *in-state* retailers not only to sell liquor face to face, but to engage in the exact same Internet sales that are prohibited to out-of-state retailers. *See, e.g., Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 849-50 (7th Cir. 2018).

According to petitioners, these protectionist measures are wholly outside the scope of the Commerce Clause and its nondiscrimination principle because that principle applies only to liquor laws that discriminate against out-of-state *products* or *producers*, not to laws that discriminate against the out-of-state retailers who wish to sell the products those producers make. That topsy-turvy proposition not only is irreconcilable with *Granholm*, but would also turn broader Commerce Clause principles on their head.

While petitioners attempt to divine a core of the Twenty-first Amendment, there is no serious debate that the core of the Commerce Clause is the protection of commerce, which is to say, the sale and transport of goods across state lines. Thus, from the perspective of the Commerce Clause, retailers are at the heart of the Clause and its protections, and producers are at the periphery. History bears this out. This Court had no difficulty upholding the constitutionality of state laws prohibiting the production and manufacture of alcoholic beverages precisely because they did not implicate "commerce," even when the manufacture was intended for export. *See, e.g.*, *Kidd v. Pearson*, 128 U.S. 1 (1888). At the same time, the Court held that the states' ability to prohibit domestic production and manufacture did not allow them to prohibit interstate commerce in alcoholic beverages. *See, e.g.*, *Leisy v. Hardin*, 135 U.S. 100 (1890).

As these decisions reflect, any reading of *Granholm* that would give states greater power to discriminate against out-of-state *retailers* than to discriminate against out-of-state *producers* would get

matters backward. And the anomalies of petitioners' position do not end there. In a world that protects out-of-state producers but not out-of-state retailers, consumers would have the ability to receive direct shipment of a wide range of domestic wines, but would have far more limited choices when it comes to wines from abroad. Given the Framers' acute concern with state laws that erect artificial and discriminatory burdens to foreign commerce, this license for greater discrimination against foreign commerce once again gets matters backward.

It is, of course, inherent in the nature of a constitutional amendment that it could alter the basic values underlying a provision in the unamended Constitution, like the Commerce Clause. But this Court generally interprets constitutional amendments to accomplish specific purposes while otherwise respecting fundamental constitutional values. In other words, this Court's tendency has been to interpret constitutional amendments in harmony with, not in derogation of, broader constitutional values. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982). *Granholm* is a case in point. This Court interpreted the Twenty-first Amendment to accomplish its framers' immediate purposes, but not to license discrimination against interstate commerce. And in doing so, the Court relied on a host of cases establishing that reading constitutional amendments to effect implied repeals is just as disfavored as any other implied repeal. *See Granholm*, 544 U.S. at 486-87.

That same approach dispenses with petitioners' effort to read the Twenty-first Amendment to turn

Commerce Clause values on their head by licensing more discrimination against out-of-state retailers than against out-of-state producers, and more discrimination against foreign commerce than domestic commerce. To be sure, as this Court recognized in *Granholm*, there may be some steps states may take in furtherance of their police powers in this realm that they may not take in others. But petitioners' position that any and all state laws regulating the retail sale and shipment of alcohol are wholly immune from Commerce Clause scrutiny finds no support in law, history, or common sense.

ARGUMENT

I. This Case Has Profound Implications For The Interstate And Foreign Wine Markets.

Particularly in today's increasingly online world, specialty wine retailers play a critical role in maximizing competition and consumer choice in the wine market. The vast majority of domestic U.S. wines are limited-production wines produced by small wineries that lack the economic resources either to work with wholesalers or to engage in significant direct out-of-state marketing themselves. Moreover, most brick-and-mortar retailers "simply do not have the shelf space to carry" anything approaching the "more than 25,000 domestic wine labels—most of which are produced by small wineries." Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (*Barriers to E-Commerce*), at 100 (July 2003), https://bit.ly/2RBmVS1. As a result, consumers who want to purchase limited-production wines from small wineries rely on specialty retailers. Likewise, small wineries who want to broaden their

consumer base beyond those who visit their wineries also rely on specialty retailers, who in turn sell the wine principally through direct sales over the Internet to in- and out-of-state customers alike.

The importance of specialty retailers is even greater when it comes to foreign wines. For even the largest foreign producers, direct shipment to consumers in the United States is not a practical option. So for all but the largest producers, relatively small and specialized retailers are the principal means of broadening customer choice. While a resident of the District of Columbia who visits a small winery in California and returns home wishing she had bought a few bottles might be able to arrange for direct shipment from the winery, the same resident who visits a comparably sized winery in Tuscany and regrets not having made a purchase does not have the same option. As a practical matter, for limited-production foreign wines, it is specialty retailers or nothing. Restrictions on commercial channels for distributing and selling foreign wine thus directly restrict foreign commerce.

Even the limited market access allowed by the current patchwork of state laws has been critical to expanding interstate commerce in wine.[2] For example, one Chicago-based retailer reported last year

---

[2] Eric Asimov, a wine writer for the New York Times, has noted that the patchwork of state laws that control wine production and distribution has resulted in "a complicated Venn diagram with scores of different circles and few points of intersection." Eric Asimov, ***Why Can't You Find That Wine?***, N.Y. Times, Feb. 11, 2014, https://nyti.ms/2E1o0OX. Indeed, "every state, maybe every municipality, offers a different [wine] selection." *Id.*

that it sold approximately half of its wine to out-of-state customers. *See* Eric Asimov, ***Wines Are No Longer Free to Travel Across State Lines***, N.Y. Times, Oct. 23, 2017, https://nyti.ms/2i0Ifjb. Another retailer of specialty wines reported that he did approximately $1 million worth of sales with out-of-state customers. Ben O'Donnell, ***In Courthouses and State Capitols, Wine Retailers Are Fighting for Direct Shipping***, Wine Spectator, Feb. 2, 2018, https://bit.ly/2AQA8z5.

Unsurprisingly, the consumer benefits from even limited interstate commerce in wine have been substantial in terms of both increased variety and decreased price. For instance, one study found that 15 percent of a sample of popular wines available online were not available from brick-and-mortar wine stores within 10 miles of McLean, Virginia. *See Barriers to E-Commerce* at 17-18. And the difference is far greater when one moves from broadly popular wines to bottlings prized by a small but dedicated following. While a Banfi Brunello or Beringer Cabernet may be widely available on retail shelves, the chances of seeing a Soldera Brunello or MacDonald Cabernet on a typical wine store shelf are slim to none. For consumers interested in such wines, specialty retailers are the key to meaningful consumer choice.

The benefits to consumers are not limited to expanded choice. Direct sales also drive down the price point of wine, often at statistically significant levels. *Id.* at 19. Moreover, retailers further enhance diversity in the U.S. wine market because they are the primary sellers of rare, older, and collectible wines, as well as wine-of-the-month clubs featuring a wider selection. In short, retailers make many wines that

otherwise would be completely off the table available to consumers at a cost-effective price.

Ideally, retailers could engage in—and customers could benefit from—direct retail-to-consumer shipments across the country. But due in large part to states yielding to the temptation to protect entrenched local interests, that ideal remains far from reality. While the Internet becomes an ever more important and powerful engine for interstate and foreign commerce for almost everything else, *see South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018), wine commerce on the Internet remains hobbled by increasingly restrictive state laws targeting and retarding interstate commerce. Currently, retailers can provide direct-to-consumer shipments in only 13 states and the District of Columbia.[3] If the Court accepts petitioners' narrow view of *Granholm* and

---

[3] For a brief overview of these regulations, *see* Alex Koral, *Direct-To-Consumer Shipping: Where is Retailer DTC Still Permitted?*, ShipCompliant, Nov. 28, 2017, https://bit.ly/2BynTXE. The Eastern District of Michigan recently struck down Michigan's ban on retailer-to-consumer direct shipping. *Lebamoff Enters., Inc. v. Snyder*, --- F. Supp. 3d ---, 2018 WL 4679612, at *7 (E.D. Mich. 2018). An appeal of that decision remains pending. Likewise, the Seventh Circuit recently reversed a district court's dismissal of a challenge to Illinois's ban on out-of-state retail shipments for failure to state a claim, holding that plaintiffs had adequately pleaded that the ban violated the Commerce Clause. *Lebamoff Enters.*, 909 F.3d at 856-87. But in doing so, the court noted that the disposition of this case could impact the ultimate determination of whether Illinois's ban passes constitutional muster. *Id.* at 849. Both decisions make plain the need for guidance from this Court on whether the Commerce Clause indeed protects retailers from discrimination.

expansive view of the Twenty-first Amendment, then the remaining states will perceive a green light to erect similar barriers, thus exacerbating a situation that already disfavors competition, consumer choice, and interstate commerce. This concern is far from hypothetical. Over the past two years alone, three more states (Missouri, Illinois, and Michigan) have proscribed retailer-to-consumer shipping. *See* Emma Balter, *Wine Lovers Face Increasing Hurdles Ordering Online*, Wine Spectator, Feb. 1, 2018, https://bit.ly/2zLWGBh.

It is hard to overstate the harms that these anticompetitive, protectionist measures engender for specialty wine retailers and the consumer choice that they foster. Restricting consumers' access to out-of-state retailers means restricting (or in many cases eliminating) their access to the wide range of wines provided by small vineyards. Small wineries, in turn, cannot sell their products on a truly national U.S. market without the aid of retailers. And specialty retailers themselves may not be able to specialize if they are restricted to an intrastate market. There are only so many lovers of German Riesling or Walla Walla Syrah, let alone Uruguayan Tannat, for a specialty retailer to be able to stock its shelves for the local community. But when those retailers can access an interstate market, they have the potential to offer consumers dozens of auslesen or every one of Cayuse's single vineyard selections. In short, laws that give in-state retailers a monopoly over direct sales to consumers have the same impact as the laws this Court struck down in *Granholm*: They "deprive citizens of their right to have access to the markets of

other States on equal terms." *Granholm*, 544 U.S. at 473.

II. Petitioners' Theory Would Produce Results At Odds With The Original Meaning And Purposes Of The Commerce Clause.

In *Granholm*, this Court confronted the unadorned version of petitioners' contention that the Twenty-first Amendment empowered states to discriminate against interstate commerce in wine and rendered interstate wine shipments unprotected by the most basic requirements of the Commerce Clause. Petitioners' junior-varsity version of that argument, under which the Commerce Clause protects wine producers, but not wine retailers, from blatantly discriminatory state laws has, if anything, even less to recommend it. Not only does petitioners' argument ignore the thrust of this Court's decision in *Granholm*; it would turn basic Commerce Clause principles on their head.

The Commerce Clause, as its name suggests, protects interstate commerce, not intrastate production with an eye toward the production's subsequent introduction into commerce. Thus, historically, states were free to ban the production and manufacture of alcoholic beverages, but they could not interfere with interstate commerce in alcohol. While the Twenty-first Amendment grants the states additional power to regulate liquor, it neither empowers them to discriminate against interstate commerce nor flips the basic constitutional order on its head. *Granholm* establishes the former principle beyond cavil, and nothing in *Granholm* or the Twenty-first Amendment supports the counterintuitive notion

that producers wholly outside the original protection of the Commerce Clause have a uniquely superior ability to engage in interstate commerce relative to retailers who directly engage in the kind of commerce that has always been at the heart of the protections of the Commerce Clause.

Petitioners' argument would further invert Commerce Clause principles by favoring domestic commerce over foreign commerce. Foreign producers and domestic customers interested in purchasing foreign wine are dependent on specialty retailers. A regime in which customers can avail themselves of direct shipments from producers in California but must depend on local retailers for wines from France has nothing to recommend it. Certainly, nothing in the Framers' conception of the Commerce Clause as an instrument for protecting against state obstacles to foreign commerce supports a regime that uniquely favors domestic producers and domestic commerce over foreign commerce.

A. Confining Commerce Clause Protections to Laws that Regulate Wine *Producers* Flips the Commerce Clause on its Head.

Article I of the Constitution provides that "Congress shall have Power ... [t]o regulate Commerce ... among the several States." U.S. Const. art. I, §8, cl. 3. This Court has long construed that power as prohibiting states from engaging in "economic protectionism—that is, [state] regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273

(1988). And the clearest violations of the Commerce Clause are laws that expressly discriminate against out-of-state commerce. *See, e.g.*, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). It was thus no great surprise that this Court held in *Granholm* that laws that allowed only in-state wineries to ship wine directly to consumers violated the Commerce Clause, notwithstanding the Twenty-first Amendment. *See Granholm*, 544 U.S. at 471 (holding that Twenty-first Amendment "does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers").

Petitioners do not ask this Court to overrule *Granholm*, but they do make the puzzling argument that the protections of *Granholm* should be limited to *producers* (a.k.a., wineries) and not extended to *retailers*. In particular, they contend that even though the Twenty-first Amendment does not allow states to discriminate against alcohol *producers*, it wholly "exempts state laws regulating the *retail* sale of alcohol—its 'delivery'—from dormant Commerce Clause scrutiny, at least where the laws in question treat alcohol produced in and out of state on equal terms." Petr.Br.24-25 (emphasis added).

As explained below, *see infra* Part III, that argument fails as a reading of *Granholm* and the relevant history of the Twenty-first Amendment. But at a more fundamental level, it turns basic Commerce Clause principles on their head. Put simply, the discrimination against the wineries in *Granholm* was unconstitutional not because they were producers, but because they wanted to sell and ship their production

in interstate commerce. The production itself was the one thing states historically *could* regulate without fear of running afoul of the Commerce Clause. Thus, treating retailers less favorably than producers because the retailers engage only in activities that have always been at the absolute core of the Commerce Clause, while producers engage in commerce incidental to production activities that were *not* historically protected by the Clause, gets matters exactly backward.

From a historical standpoint, there can be no serious debate that retailers who want to ship wines in interstate commerce are engaged in commerce to a greater degree than any producer. "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring) (citing dictionaries). The Framers often used the terms "trade (in its selling/bartering sense) and commerce interchangeably," *id.* at 586, but both terms were "used in contradistinction to productive activities such as manufacturing and agriculture," which were not protected by the Clause, *id.* at 586-87. In other words, it was crystal clear that Congress had plenary power over the sale of products in interstate commerce, while the states had plenary power over production.

Indeed, after plumbing the Constitution's drafting and ratification proceedings, including James Madison's notes on the Constitutional Convention, the *Federalist Papers*, and "every use of the term 'commerce' that appears in the reports of the state

ratification conventions," one commentator concluded that the Framers uniformly referred to commerce as "trade or exchange of goods." Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112, 114-25 (2001); *see also, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 858 (2003) (finding "overwhelming consistency of the usage of 'commerce' to refer to trading activity (especially shipping and foreign trade)").

This basic dichotomy between the trade, shipment, and exchange of retailers—*i.e.*, commerce—and production is squarely reflected in this Court's cases. Indeed, it is the reason that states were free, even before the Eighteenth Amendment, to ban the production and manufacture of alcoholic beverages, *see, e.g.*, *Kidd*, 128 U.S. 1, but not free to prohibit interstate commerce in those same beverages, *see, e.g.*, *Leisy*, 135 U.S. 100.

In *Kidd*, for example, this Court upheld an Iowa law that prohibited the manufacture and production of alcoholic beverages against a Commerce Clause challenge. In rejecting that challenge, the Court relied expressly and emphatically on the distinction between manufacture and commerce, proclaiming that "no distinction is more popular to the common mind, or more clearly expressed in economic and political literature." *Kidd*, 128 U.S. at 20. The Court viewed manufacture as "transformation—the fashioning of raw materials into a change or form of use." *Id.* Commerce was different: "The buying and selling and the transportation incidental thereto constitute commerce." *Id.* Based on that distinction, the Court

had little difficulty concluding that Iowa could exercise its police power to prohibit the manufacture of alcoholic beverages. Moreover, the Court specifically rejected the argument that a manufacturer's intent to produce alcoholic beverages solely for shipment out-of-state created a defense to the general prohibition or implicated the Commerce Clause. Instead, the Court held that "the manufacture of intoxicating liquors in a state is nonetheless business within a state" notwithstanding that "the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other states." *Id.* at 24.

In *Leisy*, by contrast, this Court held that while Iowa could prohibit the manufacture of alcoholic beverages within the state, it was not free to prohibit the importation of such beverages into the state because doing so improperly regulated interstate commerce. The Court observed that "ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and tariff, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world"; in short they are "articles of commerce." *Leisy*, 135 U.S. at 110. The Court reiterated that "[f]or the purpose of protecting its people from the evils of intemperance," a state "has the right to prohibit the manufacture within its limits of intoxicating liquors." *Id.* at 114. But the Court nonetheless held that an effort to prohibit the import of such beverages in their original packaging was "repugnant" to the Commerce Clause. *Id.* at 125.

To be sure, in its subsequent Commerce Clause cases, this Court has moved away from a categorical

approach to defining commerce and the original package doctrine. Moreover, in response to cases like *Leisy*, Congress enacted statutes to authorize state regulation of alcohol that are relevant to interpreting the Twenty-first Amendment. *See infra* Part III. But none of those subsequent developments obscures the absurdity of favoring interstate shipment of wines by producers relative to interstate shipment of wines by retailers. According to petitioners' theory, the most obvious form of commerce imaginable—"selling, buying, and bartering, as well as transporting for these purposes," *Lopez*, 514 U.S. at 585 (Thomas, J., concurring)—would be unprotected by the Commerce Clause when undertaken by a retailer, but not when undertaken by the one actor in the chain—the producer—who is least obviously within the scope of the Clause. That rule would take a Commerce Clause that is already untethered from its original moorings and make it positively unrecognizable to the Framers.

It is far more consistent with the Commerce Clause's original meaning (not to mention common sense) to conclude that *all* state regulation of the alcohol market, whether it involves out-of-state products or producers or out-of-state retailers or wholesalers, "*is limited* by the nondiscrimination principle of the Commerce Clause." Pet.App.21 (citing *Bacchus Imps. v. Dias*, 468 U.S. 263, 276 (1984)); *see also Lebamoff Enters.*, 909 F.3d at 854-55. And under that principle, states can no more close their borders to commerce with out-of-state retailers than they can close their borders to commerce with out-of-state producers.

B. Petitioners' Theory Would Distinctly Disadvantage Foreign Commerce.

Petitioners' theory would invert the constitutional order in yet another dimension. Not only would it disadvantage retailers vis-à-vis producers; it also would disadvantage foreign commerce relative to domestic commerce.

While the federal government's inability to regulate commerce among the several states was one of the most prominent problems with the Articles of Confederation, *see Granholm*, 544 U.S. at 472, the inability to maintain a united front in regulating foreign commerce was an even more glaring problem because it created the potential for a single state to embroil the entire nation in a foreign trade war. As noted by James Madison, staunch defender of strict limits on national power, "[t]he want of [authority] in [Congress] to regulate Commerce had produced in foreign nations particularly [Great Britain], a monopolizing policy injurious to the trade of the [United States], and destructive to their navigation." James Madison, *The Writings of James Madison 1783-1787* 403 (G.P. Putnam's Sons 1901).

Such restrictive policies necessarily limited the trade opportunities available to the United States, a fact that any one state working alone could not overcome. *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827), *abrogated on other grounds by Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). As Alexander Hamilton explained in *The Federalist* No. 22,

> [s]everal States have endeavored by separate prohibitions, restrictions, and exclusions to

> influence the conduct of that kingdom in this particular, but the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the States, has hitherto frustrated every experiment of the kind, and will continue to do so as long as the same obstacles to a uniformity of measures continue to exist.

Id. at 140 (A. Hamilton) (Charles R. Kesler ed., 1961).

In addition, the United States could not retaliate against policies in foreign nations that were hostile to American interests and progress, which hindered the nascent nation's ability to assert itself on the world stage. In the words of John Jay, because the United States remained a rival with many European countries "in navigation and the carrying trade[,] we shall deceive ourselves if we suppose that any of them will rejoice to see it flourish; for, as our carrying trade cannot increase without in some degree diminishing theirs, it is more their interest, and will be more their policy, to restrain than to promote it." *The Federalist* No. 4, at 41 (J. Jay) (Charles R. Kesler ed., 1961). To allay those concerns, the Constitution expressly grants Congress plenary power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, §8, cl. 3.

The Framers envisioned protecting foreign commerce as perhaps the most critical function of Article I, §8, cl. 3, as well as the exclusive purpose of the Foreign Commerce Clause. Petitioners' effort to read *Granholm* as protecting producers but not retailers would disadvantage foreign commerce at the expense of domestic commerce. Many domestic

wineries are too small to engage in significant direct shipment, but they can still take advantage of *Granholm* to ship wine to consumers in most states. As a result, a consumer who visits a west coast winery can order wine for shipment home, sign up for a mailing list, or join a wine club. Although consumers may still need to rely on retailers for back vintages, they at least have some access to interstate commerce in domestic wines through producers.

The situation for foreign wines is far bleaker. The costs of international shipment and the difficulties of applying for an importer's license make it virtually impossible for all but the largest foreign wineries to engage in direct shipment to customers in the United States. Thus, for a customer desiring a particular bottle of Italian or Argentine wine, it is retail or nothing. And for anything but the largest-production wines, only a specialty retailer with the ability to ship in interstate commerce will be able to satisfy consumer demand. A jurisprudence that artificially favors producer-shippers over retailer-shippers thus would skew the market against foreign commerce and against those more exclusively involved in what the Framers would recognize as commerce.

There is, of course, an alternative to piling up Commerce Clause anomalies. This Court can apply the logic and historical analysis of *Granholm* faithfully to protect retailers and producers alike. As demonstrated next, that is the better reading of both *Granholm* and the relevant history of the Twenty-first Amendment.

III. The History Of The Twenty-first Amendment Does Not Support The Artificial Distinction Petitioners Advance.

Petitioners seek to justify their sweeping view of state authority by resorting to the history of the Twenty-first Amendment, claiming that this history confirms that the Amendment leaves states free to close their borders to commerce with out-of-state retailers. Petr.Br.24-25. But petitioners' narrative blinks reality and ignores key pieces of evidence. Indeed, this Court reviewed this same history in *Granholm* and concluded that the Twenty-first Amendment never abrogated the nondiscrimination principle embedded in the Commerce Clause. Nothing in *Granholm* or the relevant history suggests that Congress somehow meant to discriminate in retaining that nondiscrimination principle, allowing laws that discriminate against out-of-state *retailers*, but not those that discriminate against out-of-state *producers*. Such a rule not only would be bizarre, but would be wholly antithetical to the nondiscrimination and broader Commerce Clause principles that the Twenty-first Amendment left undisturbed.

More than 30 years before Prohibition, this Court clearly held that state laws that discriminate against interstate commerce in alcohol are "a usurpation of the power conferred by the constitution upon the congress of the United States." *Walling v. Michigan*, 116 U.S. 446, 455 (1886); *see also Rhodes v. Iowa*, 170 U.S. 412, 424 (1898) (noting that state alcohol-related "legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of

congress"). The Court did not confine that proposition to laws that discriminated against alcohol *produced* out of state; to the contrary, the Court repeatedly confirmed that states are prohibited from discriminating "against *the citizens* or products of other states." *Walling*, 116 U.S. at 449 (emphasis added).

Petitioners claim that the Wilson Act, ch. 728, 26 Stat. 313, 313 (1890) (codified at 27 U.S.C. §121), and the Webb-Kenyon Act, ch. 90, 37 Stat. 699, 699 (1913) (codified at 27 U.S.C. §122), displaced this nondiscrimination principle and granted states virtually unfettered authority over alcohol distribution. But as this Court already concluded in *Granholm*, that misreads the history. To be sure, petitioners are correct that Congress passed the Wilson Act to empower states to prohibit the importation of out-of-state alcohol notwithstanding the "original package doctrine" applied in cases like *Leisy*. But the point of the Wilson Act was certainly not to empower states to discriminate against interstate commerce. Instead, the point was to abrogate a doctrine that precluded states from keeping Illinois beer out of Iowa even though Iowa had previously banned the domestic production of beer and other alcoholic beverages. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000). Thus, far from freeing states to discriminate in favor of in-state producers or retailers, the Wilson Act required liquor "transported" into the state to be treated "*in the same manner* as though such liquids or liquors had been produced in such State." 27 U.S.C. §121 (emphasis added).

Moreover, the Wilson Act notably provided that liquor "shall upon arrival" be subject only to laws of the state "enacted in the exercise of its police powers." 26 Stat. 313. That is key because, as this Court recognized when interpreting the Wilson Act in *Scott v. Donald*, 165 U.S. 58 (1897), to be a valid exercise of that police power, such laws *could not discriminate against interstate commerce*. *Id.* at 100. The Wilson Act thus "was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden." *Id.* Instead, the Wilson Act simply ensured that dry states could adequately enforce their prohibition laws against in-state and out-of-state liquor alike.

As for the Webb-Kenyon Act, that Act did not purport to eliminate the nondiscrimination principle that the Wilson Act retained. Instead, it simply made clear that "States were now empowered to forbid shipments of alcohol to consumers for personal use, *provided that the States treated in-state and out-of-state liquor on the same terms*." *Granholm*, 544 U.S. at 481 (emphasis added); *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 323-24 (1917). In other words, like the Wilson Act before it, the Webb-Kenyon Act merely sought to enable states to pursue *prohibition* more effectively. Once again, this meant that state laws had to be valid exercises of the police power—*i.e.*, they must comply with the Commerce Clause's nondiscrimination principle—to pass muster under the Webb-Kenyon Act. Numerous state courts understood the law exactly this way, *see, e.g.*, *Brennen v. S. Express Co.*, 90 S.E. 402, 404 (S.C. 1916) (noting that Webb-Kenyon Act "was not intended to confer

and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce").

In sum, in the time leading up to passage of the Eighteenth Amendment and the onset of Prohibition, courts understood that the Wilson and Webb-Kenyon Acts did not cede to states the novel and untrammeled authority to intrude upon the traditionally plenary federal power to regulate interstate commerce. When Prohibition ended, the Twenty-first Amendment simply restored to states the police power they had enjoyed before Prohibition, but no more. Thus, if states wanted to ban the in-state sale of liquor, they could ban the import of liquor as well. But they could not ban the latter while permitting the former. The textual relationship between the Webb-Kenyon Act and the Amendment makes this clear. Whereas the Webb-Kenyon Act "prohibit[s]" the "shipment or transportation" of alcohol into a state where it is "intended ... to be received, possessed, sold, or in any manner used ... in violation of any law of such State," 37 Stat. 699, 699-700, Section 2 of the Twenty-first Amendment "prohibit[s]" "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof," U.S. Const. amend XXI, §2. Thus, the text of the Amendment closely tracks pre-Prohibition legislation, which in turn embodied *all* of the Commerce Clause's nondiscrimination principles, not just the principle that states may not discriminate against interstate commerce with out-of-state *producers*.

Much of this history was surveyed in *Granholm* and supported the Court's conclusion that the Twenty-first Amendment did not amount to a novel, sweeping grant of power to the states to discriminate against interstate commerce. Nothing in that history or *Granholm* supports the bizarre notion that in withholding the power to discriminate against interstate commerce, the Amendment nonetheless granted an unprecedented power to discriminate between forms of interstate commerce—favoring both in-state retailers and out-of-state producers over out-of-state retailers. Such a construction has no grounding in history and would offend the broader principle, well reflected in *Granholm*, that constitutional amendments should be read in harmony with broader constitutional principles. *See Granholm*, 544 U.S. at 486-87. Whatever disputes there may be about the scope of the Commerce Clause, it plainly protects the core activity of retailers who want to ship wine in interstate commerce, and just as plainly prohibits discrimination against out-of-state entities. Nothing in the Twenty-first Amendment remotely stands as an obstacle to those enduring constitutional principles.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
LAURA WOLK
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com
Counsel for Amicus Curiae

December 20, 2018

No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Paul E. Pisano
National Beer
Wholesalers Association
1101 King Street
Suite 600
Alexandria, VA 22314
703-683-4300

Michael D. Madigan
Counsel of Record
Brandt Erwin
Madigan, Dahl & Harlan, P.A.
222 South Ninth Street
Suite 3150
Minneapolis, MN 55402
612-604-2000
madigan@mdh-law.com
erwin@mdh-law.com

Counsel for *Amicus Curiae National Beer Wholesalers Association*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Introduction 7

II. Policy Underlying the Challenged Statute. 8

III. The Congressional and Constitutional History of Liquor Regulation 23

A. The Eighteenth Amendment. 23

B. The Twenty-first Amendment 29

C. The Twenty-first Amendment and Dormant Commerce Clause. 32

IV. State Liquor Laws Structuring the Distribution System Within the State's Borders are Entitled to Extraordinary Deference Under the Twenty-first Amendment. 52

CONCLUSION 57

TABLE OF AUTHORITIES

Cases

44 Liquor Mart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....34

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009).....*passim*

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984).....35, 36, 37, 39

Bowman v. Chi. & Nw. Ry. Co.,
125 U.S. 465 (1888).....25

Brooks v. Vassar,
462 F.3d 341 (4th Cir. 2006).....44, 46, 47

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,
476 U.S. 573 (1986).....35

Byrd v. Tennessee Wine and Spirit Retailers Association,
883 F.3d 608 (6th Cir. 2018).....1, 2, 6, 7

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980).....30

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984).....38

Clark Distilling Co. v. Western Maryland Railway Co., 242 U.S. 311 (1917) 27

Carter v. Virginia, 321 U.S. 131 (1944) 53

Cooper v. Texas Alcoholic Beverage Commission, 820 F.3d 730 (5th Cir. 2016) 51

Costco v. Hoen, 522 F.3d 874 (9th Cir. 2008) 54

Craig v. Boren, 429 U.S. 190 (1976) 34

Dugan v. Bridges, 16 F. Supp. 694 (D.N.H. 1936) 26, 27

Finch v. McKittrick, 305 U.S. 395 (1939), *abrogated by Granholm v. Heald*, 544 U.S. 460 (2005) 34

Granholm v. Heald, 544 U.S. 460 (2005) ..... *passim*

Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) 35

Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939), *abrogated by Granholm v. Heald*, 544 U.S. 460 (2005) 34

Larkin v. Grendel's Den, 459 U.S. 116 (1982) 34

Lebamoff Enterprises, Inc. v. Huskey,
666 F.3d 455 (7th.Cir. 2012).....54

Lehnhausen v. Lake Shore Auto Parts, Co.,
410 U.S. 356 (1973).....56

Leisy v. Hardin,
135 U.S. 100 (1890).....24

Loretto Winery, Ltd. v. Gazzara,
601 F. Supp. 850 (S.D.N.Y. 1985) 28

North Dakota v. U.S.,
495 U.S. 423 (1990).....35, 37, 38

Rhodes v. Iowa,
170 U.S. 412 (1898).....25

Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013).....*passim*

United States v. Frankfort Distilleries, Inc.,
324 U.S. 293 (1945).....31

U.S. v. Anheuser-Busch InBev SA/NV and SABMiller plc,
Case No. 1:16-cv-01483-EGS, Doc. 42
(D.D.C. October 22, 2018).....10

Wine Country Gift Baskets.com vs. Steen,
612 F.3d 809 (5th Cir. 2010).....51, 54

Wisconsin v. Constantineau,
400 U.S. 433 (1971).....34

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 33

Constitutional Provisions

U.S. CONST. amend. I 34
U.S. CONST. amend. XVIII 9, 27
U.S. CONST. amend. XXI ..... *passim*
U.S. CONST. amend. XXI, § 2 ..... 30, 31, 40
U.S. CONST. amend. XXI, § 3 30

Statutes

235 Ill. Comp. Stat. Ann. § 5/6-8 13
237 Neb. Admin. Code Ch. 6, Sec. 010 13
27 U.S.C. § 201. 17
27 U.S.C. § 204 17
27 U.S.C. § 205 17
27 U.S.C. § 205(e) 17
3 R.I. Gen. Laws Ann. § 3-5-10(a)(1) 14
3 R.I. Gen. Laws Ann. § 3-5-10(b)(1) 16
42 U.S.C. § 290[illegible]-25b(b)(7) 17
47 Pa. Stat. Ann. § 4-431(c) 16
47 Pa. Stat. Ann. § 4-441(g) 13
47 Pa. Stat. Ann. § 4-410(d) 14
47 Pa. Stat. Ann. § 4-431(c) 14
7 VT Stat. § 63(b) 14

Ala. Code § 28-1-4(b) 13
Ala. Code § 28-3A-8 13
Ala. Code § 28-3A-9 13
Ariz. Rev. Stat. Ann. § 4-202 16
Ariz. Rev. Stat. Ann. § 4-243.01(B) 13
Ariz. Rev. Stat. Ann. § 4-402(A) 14
Ark. Code Ann. § 3-4-606(a) 14, 15
Ark. Code Ann. § 3-5-216 13
Cal. Bus. & Prof. Code § 24041 13
Colo. Rev. Stat. Ann. § 44-3-407(1)(d) 13
Conn. Agencies Regs. § 30-6-B9 13
Del. Code Ann. tit. 4, § 501(f) 13
Fla. Stat. Ann. § 561.5101 13
Haw. Rev. Stat. Ann. § 281-3 13
Idaho Code Ann. § 23-1028 13
Idaho Code Ann. § 23-304 14
Ind. Code Ann. § 7.1-3-3-5(b) 13
Iowa Code Ann. § 123.130(2) 13
Iowa Code Ann. § 123.3(34) 14, 15
Iowa Code Ann. § 123,127(2)(b) 14, 15
Kan. Admin. Regs. § 14-5-6 13
Ky. Rev. Stat. Ann. § 243.100(1)(f) 14
Ky. Rev. Stat. Ann. § 244.167(1)(d) 13
La. Stat. Ann. § 26:359(A) 13
La. Stat. Ann. § 26:80(A)(2) 14

Mass. Gen. Laws Ann. Ch. 138, § 18 ..... 13, 14, 15
MD AL BEV § 3-102 ..... 14, 15
MD AL BEV § 3-105(b) 15
Md. Code Regs. § 03.02.01.20 13
Me. Rev. Stat. tit. 28A, § 1361(4) 13
Me. Rev. Stat. tit. 28-A, § 1401(5)(A) 14
Me. Rev. Stat. tit. 28-A, § 1401(5)(B) 15
Mich. Comp. Laws Ann. § 436.1601(1) 14, 15
Mich. Comp. Laws Ann. § 436.1601(4) 15
Minn. Stat. Ann. § 340A.305 13
Miss. Code Ann. § 27-71-349(6) 13
Miss. Code Ann. § 67-3-21 ..... 14, 15
Mo. Ann. Stat. § 311.060(1) 14
Mo. Ann. Stat. § 311.060(3) 15
Mo. Ann. Stat. § 311.373 13
Mont. Code Ann. § 16-3-230 13
N.C. Gen. Stat. Ann. § 18B-1113 13
N.C. Gen. Stat. Ann. § 18B-900(a)(2) 14
N.D. Admin. Code § 81-12-01-04 13
N.D. Cent. Code Ann. § 5-03-01(1) 14
N.D. Cent. Code Ann. § 5-03-01 16
N.H. Rev. Stat. Ann. § 178:1(III) 14, 15
N.H. Rev. Stat. Ann. § 178:16(I) 13
N.J. Admin. Code § 13:2-25.3 13
N.J. Stat. Ann. § 33:1-11.3 ..... 14, 15

N.M. Stat. Ann. § 60-6A-1(B) 13
N.M. Stat. Ann. § 60-6B-2(A)(3) 14, 16
Neb. Rev. Stat. Ann. § 53-125 ..... 14, 16
Nev. Rev. Stat. Ann. § 369.4855 13
Nev. Rev. Stat. Ann. § 369.487 13
Ohio Admin. Code § 4301:1-1-22(B) 13
Okla. Stat. Ann. tit. 37A, § 2-146(A)(1) 14, 15
Okla. Stat. Ann. tit. 37A, § 3-110(E) 13
R.I. Code R. § 11-4-8:4, Rule 19(b)(1) 13
S.C. Code Ann. § 61-4-1100(2)(d) 13
S.C. Code Ann. § 61-6-110(2) 14, 15, 16
S.D. Codified Laws § 35-4-60.1 13
Tenn. Code Ann. § 57-3-203 17
Tenn. Code Ann. § 57-3-203 (b)(1) 14, 15
Tenn. Code Ann. § 57-3-203(f) 16
Tenn. Code Ann. § 57-3-204 19
Tenn. Code Ann. § 57-3-204 (b) (4) 21
Tenn. Code Ann. § 57-5-201(c) 13
Tenn. Code Ann. § 57-3-102 20
Tenn. Code Ann. § 57-3-103 20
Tenn. Code Ann. § 57-3-202 18
Tenn. Code Ann. § 57-3-204 (b) 5
Tenn. Code Ann. § 57-3-301(b) 18
Tenn. Code Ann. § 57-3-303(a) 18
Tenn. Code Ann., Title 57 16

Tex. Alco. Bev. Code Ann. § 107.06(b) 13-14
Tex. Alco. Bev. Code Ann. § 6.03(a) 14, 15
Tex. Alco. Bev. Code Ann. § 6.03(k) 16
Utah Code Ann. § 32B-13-301(9)(b)(ii) 14
Va. Code Ann. § 4.1-223(1) 14
Va. Code Ann. § 4.1-310 (2007) 46
W. Va. Code Ann. § 11-16-8(a) 14, 15, 16
Webb-Kenyon Act, 27 U.S.C. § 122 (1913) ..... *passim*
Wilson Act, 27 U.S.C. § 121 (1890) 25, 40
Wis. Stat. Ann. § 125.04 16
Wis. Stat. Ann. § 125.04(5)(a)(2) 14, 15
Wis. Stat. Ann. § 125.34(2) 14
Wyo. Stat. Ann. § 12-1-101(xii) 16
Wyo. Stat. Ann. § 12-1-101(xiii) 14, 15, 16
Wyo. Stat. Ann. § 12-2-201(a) 14, 15, 16

Other Authorities

2017 Beer Industry in Review, NBWA 20
David S. Versfelt, Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578 (1975) 29

Dr. Bill Latham & Dr. Ken Lewis of the Center for Applied Business & Economic Research at the University of Delaware, America's Beer Distributors: Fueling Jobs, Generating Economic Growth & Delivering Value to Local Communities, at 8-13 (2015) 4

How High Are Beer Taxes in Your State?, Tax Foundation 18

Jane O'Brien, *The Time When Americans Drank All Day Long*, BBC NEWS (Mar. 9, 2015) 23

Jason E. Prince, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563 (2004) 26

John D. Rockefeller, *Foreword* in Raymond Fosdick and Albert Scott, *Toward Liquor Control* (1933) .28

Michael D. Madigan, *Control Versus Competition: The Courts' Enigmatic Journey in the Obscure Borderland Between the Twenty-first Amendment and Commerce Clause*, 44:4 Mitchell Hamline L. Rev. (2018) 12-13

National Prohibition Law: Hearings Before the S. Comm. on the Judiciary, Subcomm. on Bills to Amend the National Prohibition Act, 69th Cong. 197 (1926) 29

Nora v. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613 (1994) 28

Norman H. Clark, *Deliver Us From Evil:*

An Interpretation of American Prohibition, 122 (1976).....24

Note, *"Police Power" Under the Wilson Act of 1890*, 19 HARV. L. REV. 53, 53–54 (1905).....25

Preventing Alcohol Abuse, Centers for Disease Control and Prevention, ...8

Preventing Excessive Alcohol Consumption: Regulation of Alcohol Outlet Density, The Community Guide, CDC.....11

Public Law 114-255 Stop Underage Drinking Act...17

Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers (1933) 11, 23, 28

Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161 (1991).....27, 28, 30, 31

State Shared Taxes in Tennessee, Tennessee Advisory Commission on Intergovernmental Relations 18

State-Level Alcohol Laws Face A Federal Challenge in the Supreme Court, Leonine Public Affairs.....53

Testimony of Craig Purser, President, National Beer Wholesaler Association, to the Senate Judiciary Subcommittee on Antitrust, Competition, Policy, and Consumer Rights.....5

Thomas Pinney, *A History of Wine in America: From the Beginnings to Prohibition* 434 (1989) 28

W.J. Rorabaugh, *The Alcoholic Republic: An American Tradition* 5 (1979).....23, 24

Wet and Dry Counties, NABCA 21

Congressional Record

49 CONG. REC. 2687 (1913).....26
49 CONG. REC. 4292 (1913).....26

INTEREST OF AMICUS CURIAE*

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer distributing industry representing over 3,000 family-owned independent licensed beer distribution entities. Its members reside in all 50 states and employ over 130,000 individuals.

This case implicates critical interests of NBWA and its members. The Sixth Circuit decision in *Byrd v. Tennessee Wine and Spirit Retailers Association*, 883 F.3d 608 (6th Cir. 2018) threatens to either dismantle or substantially undermine complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over

---

* No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NBWA or its members made a monetary contribution for the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

80 years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing vertical integration of the industry; inhibiting overly aggressive marketing and consumption; preventing illegal sales to minors; collecting taxes; creating orderly, transparent, and accountable distribution and importation systems; and preventing a recurrence of the problems that led to the enactment of National Prohibition.

Specifically, the *Byrd* decision puts at risk the requirement that all alcoholic beverages sold in a State must be delivered to an in-state wholesaler and sold to the public through an in-state retailer, thereby assuring effective regulation. Wholesalers serve as the essential regulatory gateway through which alcoholic beverages must pass. As the licensed in-state entity subject to effective audit and

enforcement, wholesalers are required to ensure that the suppliers from whom they buy product and the retailers to whom they sell product are fully compliant with all applicable regulatory requirements. Furthermore, wholesalers are obligated to pay excise and other taxes to the State and retain records of their purchases from suppliers and their sales to retailers, thereby creating a transparent and accountable distribution system. They have typically invested millions of dollars in refrigerated warehouses, rolling stock, a sales force, a delivery force, and marketing and promotion funds in order to build the necessary distribution infrastructure in a highly regulated environment. These investments are jeopardized if the industry is deregulated in effect by judicial review and the competitive playing field is tipped against in-state licensees.

The existence of the wholesale tier produces significant efficiencies for suppliers, retailers and the economy by reducing the costs of transporting beer, servicing retailers and providing consumers with a wider range of choices than they would otherwise enjoy.[1] In addition, small suppliers and new market entrants, lacking substantial resources, leverage the wholesalers' infrastructure to create and grow a market for their products. Without this infrastructure, the barriers to vertical integration erected by the three-tier system and the prohibitions embodied in the related tied-house laws, small suppliers would be unable to compete with multinational suppliers. Furthermore, American

---

[1] Dr. Bill Latham & Dr. Ken Lewis of the Center for Applied Business & Economic Research at the University of Delaware, *America's Beer Distributors: Fueling Jobs, Generating Economic Growth & Delivering Value to Local Communities*, at 8-13 (2015) (https://www.nbwa.org/resources/economic-impact.).

consumers would not enjoy the unprecedented choice and variety offered by the current regulatory system.[2]

SUMMARY OF ARGUMENT

In a divided decision, the Sixth Circuit Court of Appeals invalidated a Tennessee durational residency requirement for retail liquor licenses on the basis that it violated the dormant Commerce Clause doctrine. However, Tenn. Code Ann.§ 57-3-204 (b) (hereinafter referred to as the "challenged statute") constitutes a key component of Tennessee's comprehensive regulations governing the sale and distribution of liquor within its borders. As such, it is shielded from challenge under that doctrine.

---

[2] *See* Testimony of Craig Purser, President, National Beer Wholesaler Association, to the Senate Judiciary Subcommittee on Antitrust, Competition, Policy, and Consumer Rights. (https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Purser%20Testimony.pdf).

As articulated by the Court in *Granholm v. Heald*, 544 U.S. 460 (2005), state liquor laws which discriminate against out-of-state producers and their products implicate federal interests under the Commerce Clause and are thereby subject to its dormant constraints. On the other hand, state liquor laws, like the challenged statute, which structure a state's liquor distribution system within its borders implicate state interests under the Twenty-first Amendment and are free from such restraints. In this way, the Court struck a delicate balance between the respective federal and state interests and conclusively resolved the conflict between the two constitutional provisions.[3]

---

[3] In his dissent, Judge Sutton noted that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause". *Byrd*, 883 F.3d at 631 (Sutton, J. dissenting). While the Commerce Clause still limits "state efforts to regulate activity outside of a State's territorial domain" and prohibits discrimination against producers and their products, the Twenty-first Amendment shields state liquor laws which structure the State's distribution system

ARGUMENT

I. Introduction.

NBWA urges the Court to reverse the Sixth Circuit and uphold the constitutionality of the challenged statute. NBWA's Brief will focus on the pertinent policies underlying Tennessee's liquor regulatory system and the challenged statute, the constitutional history underlying the Twenty-first Amendment as it applies to this case, the holding of the *Granholm* Court which struck an appropriate balance between state authority under the Twenty-first Amendment and federal authority under the Commerce Clause, and the reasons why that holding

---

within its borders from Commerce Clause challenge. *Id* at 632-33. On that basis, Judge Sutton would have validated the durational residency statute except as to its application to 100% of a retailer's stockholders and the imposition of a ten-year residency requirement for renewal of a license. *Id.* at 635. Presumably, Judge Sutton felt that the latter two provisions did not pass muster under even the Equal Protection rational basis test.

supports a conclusion that the challenged statute passes constitutional muster.

II. Policy Underlying the Challenged Statute.

Since the dawn of recorded history, alcohol has enriched our culinary experiences, social gatherings, and lives. When abused, however, it has also occasioned great harm. According to the federal government's Centers for Disease Control and Prevention, alcohol contributes to over 88,000 deaths each year in this country, and excessive drinking costs our economy over $224 billion annually.[4] Few, if any, publicly-available products embody a similar potential to create such great societal harm.

Federal, state, and local governments have attempted to mitigate the detrimental impacts of alcohol abuse through regulation of the alcohol

---

[4] *Preventing Alcohol Abuse*, Centers for Disease Control and Prevention ("CDC") (https://www.cdc.gov/alcohol/fact-sheets/prevention.htm).

industry and the consumer. Alcohol has always been, and remains, one of the most heavily regulated products in the United States. It is unique in terms of its status in law. It is the only commercial product that has been the subject of two constitutional amendments: the Eighteenth Amendment, which instituted national Prohibition, and the Twenty-first Amendment, which not only repealed Prohibition, but also assigned primary responsibility for alcohol regulation to the states.[5]

All state alcohol regulatory systems strive to achieve moderation in both the consumption and sale of intoxicating liquor. The goal is to create an "orderly" market that balances competition with appropriate control. Three-tier and tied-house laws are the keystones of American alcohol regulation. Pursuant to their plenary authority under the

---

[5] U.S. CONST. amends. XVIII, XXI.

Twenty-first Amendment, states regulate alcohol within their respective borders through a three-tier system with licensed and structurally separate producers, wholesalers, and retailers. "Tied-house" laws support a three-tier system by prohibiting suppliers and wholesalers, with narrow exceptions, from providing items of value to or exercising control over or ownership in retailers. The purpose of the system is, in part, to avoid the harmful effects of vertical integration in the industry by restricting these market participants to their respective service functions.[6]

The American historical experience has proven that vertical integration and "tied houses" lead to excessive retail capacity, cutthroat

---

[6] As illustrated by the recent Modified Final Judgment entered in the matter of *U.S. v. Anheuser-Busch InBev SA/NV and SABMiller plc*, concerns about vertical integration remain very relevant today. Case No. 1:16-cv-01483-EGS, Doc. 42 (D.D.C. October 22, 2018) (requiring divestiture of certain assets and imposition of safeguards protecting wholesaler independence).

competition for market share, and overstimulated sales which ultimately leads to intemperate consumption.[7] It is widely recognized that prior to prohibition, "tied houses" were a root cause of alcohol abuse and related problems because retailers were pressured to sell product by any means including selling to minors, selling after hours, and overselling to intoxicated customers.[8] This Court has expressly recognized that the three-tier system is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005).

---

[7] In *Toward Liquor Control*, Fosdick and Scott noted that "tied-houses" lead to a "multiplicity of outlets."
Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933) (Republished by Center for Alcohol Policy 2011). Federal officials have noted a correlation between the number and density of retail outlets, on the one hand, and consumption patterns and abuse, on the other. *See Preventing Excessive Alcohol Consumption: Regulation of Alcohol Outlet Density*, The Community Guide, CDC, (https://www.thecommunityguide.org/findings/alcohol-excessive-consumption-regulation-alcohol-outlet-density).

[8] These remain a concern of policymakers 'o this day. *See*, for example, *Preventing Excessive Alcohol Consumption*, The Community Guide, CDC (http://www.thecommunityguide.org/alcohol).

In addition to promoting temperance, State regulatory systems have achieved many other benefits for the American public, including unprecedented choice and variety of distilled spirits, wines, and beers. As evidenced by the explosion of craft distilleries, wineries, breweries, and the existence of a strong, independent middle tier, the system nurtures small, entrepreneurial businesses and provides a level playing field on which they can fairly compete. The industry remains one of the last mainstays of family-owned businesses. As a result, alcohol vendors are rooted in their community, more likely to be sensitive to local norms and standards, more likely to be compliant with existing regulations, and more vulnerable to effective enforcement. *See* Michael D. Madigan, *Control Versus Competition: The Courts' Enigmatic Journey in the Obscure Borderland Between the Twenty-first Amendment*

and Commerce Clause, 44:4 Mitchell Hamline L. Rev. (2018)[9].

The three-tier system has been likened to an hour glass. With very limited exceptions, all alcohol sold within a state, regardless of its origin, must be sold through a wholesaler with a physical presence in the state.[10] Beyond physical presence, twenty-

---

[9] https://mitchellhamline.edu/law-review/2018/04/06/michael-d-madigan-control-versus-competition-the-courts-enigmatic-journey-in-the-obscure-borderland-between-the-twenty-first-amendment-and-commerce-clause/.

[10] *See* Ala. Code § 28-1-4(b); Ala. Code §§ 28-3A-8 and 28-3A-9; Ariz. Rev. Stat. Ann. § 4-243.01(B); Ark. Code Ann. § 3-5-216; Cal. Bus. & Prof. Code § 24041; Colo. Rev. Stat. Ann. § 44-3-407(1)(d); Conn. Agencies Regs. § 30-6-B9; Del. Code Ann. tit. 4, § 501(f); Fla. Stat. Ann. § 561.5101; Haw. Rev. Stat. Ann. § 281-3; Idaho Code Ann. § 23-1028; 235 Ill. Comp. Stat. Ann. § 5/6-8; Ind. Code Ann. § 7.1-3-3-5(b); Iowa Code Ann. § 123.130(2); Kan. Admin. Regs. § 14-5-6; Ky. Rev. Stat. Ann. § 244.167(1)(d); La. Stat. Ann. § 26:359(A); Me. Rev. Stat. tit. 28A, § 1361(4); Md. Code Regs. § 03.02.01.20; Mass. Gen. Laws Ann. Ch. 138, § 18; Minn. Stat. Ann. § 340A.305; Miss. Code Ann. § 27-71-349(6); Mo. Ann. Stat. § 311.373; Mont. Code Ann. § 16-3-230; 237 Neb. Admin. Code Ch. 6, Sec. 010; Nev. Rev. Stat. Ann. §§ 369.4855 and 369.487; N.H. Rev. Stat. Ann. § 178:16(I); N.J. Admin. Code § 13:2-25.3; N.M. Stat. Ann. § 60-6A-1(B); N.C. Gen. Stat. Ann. § 18B-1113; N.D. Admin. Code § 81-12-01-04; Ohio Admin. Code § 4301:1-1-22(B); Okla. Stat. Ann. tit. 37A, § 3-110(E); 47 Pa. Stat. Ann. § 4-441(g); R.I. Code R. § 11-4-8:4, Rule 19(b)(1); S.C. Code Ann. § 61-4-1100(2)(d); S.D. Codified Laws § 35-4-60.1; Tenn. Code Ann. § 57-5-201(c); Tex. Alco. Bev.

eight states impose a residency requirement upon individuals in order to obtain a wholesaler license.[11] Of the states that impose a residency requirement, sixteen states also impose a durational aspect to that requirement.[12] A number of those states that require

---

Code Ann. § 107.06(b); Utah Code Ann. § 32B-13-301(9)(b)(ii); 7 VT Stat. § 63(b); Wis. Stat. Ann. § 125.34(2).

[11] *See* Ariz. Rev. Stat. Ann. § 4-402(A); Ark. Code Ann. § 3-4-606(a); Idaho Code Ann. § 23-304; Iowa Code Ann. §§ 123.3(34), 123,127(2)(b) (residency requirement in definition of "person of good moral character"); Ky. Rev. Stat. Ann. § 243.100(1)(f); La. Stat. Ann. § 26:80(A)(2); Me. Rev. Stat. tit. 28-A, § 1401(5)(A); MD AL BEV § 3-102; Mass. Gen. Laws Ann. Ch. 138, § 18; Mich. Comp. Laws Ann. § 436.1601(1); Miss. Code Ann. § 67-3-21; Mo. Ann. Stat. § 311.060(1); Neb. Rev. Stat. Ann. § 53-125; N.H. Rev. Stat. Ann. § 178:1(III); N.J. Stat. Ann. § 33:1-11.3(containing residency reciprocity requirement for sale to New Jersey retailers); N.M. Stat. Ann. § 60-6B-2(A)(3) (requiring a New Mexico resident that has power of attorney and power to bind applicant related to sales and operations); N.C. Gen. Stat. Ann. § 18B-900(a)(2); N.D. Cent. Code Ann. § 5-03-01(1); Okla Stat. Ann. Tit. 37A, § 2-146(A)(1); 47 Pa. Stat. Ann. §§ 4-410(d) and 4-431(c); 3 R.I. Gen. Laws Ann. § 3-5-10(a)(1); S.C. Code Ann. § 61-6-110(2); Tenn. Code Ann. § 57-3-203 (b)(1); Tex. Alco. Bev. Code Ann. § 6.03(a); Va. Code Ann. § 4.1-223(1) (requiring applicant to establish a place of business within Virginia); W. Va. Code Ann. § 11-16-8(a); Wis. Stat. Ann. § 125.04(5)(a)(2); Wyo. Stat. Ann. §§ 12-1-101(xiii) and 12-2-201(a).

[12] *See* Ark. Code Ann. § 3-4-606(a) (5 year duration); Idaho Code Ann. § 23-304 (6 month durational residency requirement for special wholesalers); Ky. Rev. Stat. Ann. § 243.100(1)(f) (1 year duration); La. Stat. Ann. § 26:80(A)(2) (2 year duration); Me. Rev. Stat. tit. 28-A, § 1401(5)(A) (6 month duration); MD AL

any form of residency extend that requirement to corporate applicants.[13] Finally, some states require

---

BEV § 3-102 (2 year duration); Mich. Comp. Laws Ann. § 436.1601(1) (1 year duration); Miss. Code Ann. § 67-3-21 (2 year duration); N.H. Rev. Stat. Ann. § 178:1(III) (3 year duration for liquor and wine representatives); Okla Stat. Ann. Tit. 37A, § 2-146(A)(1) (5 year duration for non-beer wholesalers); S.C. Code Ann. § 61-6-110(2) (30 day duration); Tenn. Code Ann. § 57-3-203 (b)(1) (2 year duration); Tex. Alco. Bev. Code Ann. § 6.03(a) (1 year duration); W. Va. Code Ann. § 11-16-8(a) (4 year duration); Wis. Stat. Ann. § 125.04(5)(a)(2) (90 day duration); Wyo. Stat. Ann. §§ 12-1-101(xiii) and 12-2-201(a) (1 year duration).

[13] *See* Ark. Code Ann. § 3-4-606(a) (5 year duration for each officer, director, manager, or stockholder); Iowa Code Ann. §§ 123.3(34), 123,127(2)(b) (residency requirement extended to each officer, director, partner, and person owning or controlling 10% or more of stock, or with an interest of 10% of more in the ownership or profits of such person); Me. Rev. Stat. tit. 28-A, § 1401(5)(B) (6 month durational business requirement for corporate applicant); MD AL BEV § 3-105(b) (corporate license to be issued to 3 officers as individuals, with at least one of the officers required to be a resident of Maryland for at least 2 years); Mass. Gen. Laws Ann. Ch. 138, § 18 (requiring majority of directors of a corporation to be residents of Massachusetts); Mich. Comp. Laws Ann. § 436.1601(4) (1 year durational residency requirement for all stockholders); Miss. Code Ann. § 67-3-21 (prohibiting granting of a wholesaler's license unless applicant has been a resident for 2 years); Mo. Ann. Stat. § 311.060(3) (3 year durational residency requirement for officers, directors, and 60% of stockholders); N.H. Rev. Stat. Ann. § 178:1(III) (3 year durational residency requirement for at least one officer, director, or partner of corporate applicant for a liquor and wine representatives license); N.J. Stat. Ann. § 33:1-11.3 (prohibiting a foreign person [which, by definition includes a corporation] to sell to New Jersey retailers unless a reciprocal provision exists in the state in which such person is a resident); Okla Stat. Ann. Tit. 37A, § 2-146(A)(1) (5 year durational residency requirement for non-beer wholesalers including, by

a corporate entity to have an appointed agent, manager, or attorney in fact that satisfies residency requirements in order for such entity to receive a wholesaler license.[14] Most states impose similar requirements on retailers.

Tennessee regulates the sale and distribution of alcohol within its borders through a "three-tier system" of licensed and structurally separate producers, wholesalers, and retailers. *See* Tenn. Code Ann., Title 57. A wholesaler must obtain a Federal

---

implication, corporate applicants); 47 Pa. Stat. Ann. § 4-431(c)(residency requirement for officers, directors, and 51% of capital stock ownership); 3 R.I. Gen. Laws Ann. § 3-5-10(b)(1) (residency requirement for officers, directors, or stockholders of corporate applicant if corporation has less than 25 stockholders); S.C. Code Ann. § 61-6-110(2) (30 day durational residency requirement for person in control and management of the business); Tenn. Code Ann. § 57-3-203(f) (5 year durational residency requirement for stockholders); Tex. Alco. Bev. Code Ann. § 6.03(k) (1 year durational residency requirement for 51% or more of its stockholders); W. Va. Code Ann. § 11-16-8(a) (4 year durational residency requirement for members, officers, or other persons in active control of the activities of the company); Wyo. Stat. Ann. §§ 12-1-101(xii) and (xiii) and 12-2-201(a) (1 year durational residency requirement for a "person" which includes, by definition, a corporation).

[14] *See* Ariz. Rev. Stat. Ann. § 4-202; Neb. Rev. Stat. Ann. § 53-125; N.M. Stat. Ann. § 60-6B-2(A)(3); N.D. Cent. Code Ann. § 5-03-01; Wis. Stat. Ann. § 125.04.

Basic Permit from the Alcohol and Tobacco Tax and Trade Bureau,[15] a Wholesaler License from the Tennessee Alcoholic Beverage Commission, and an Employee Permit for each employee involved with the delivery and sale of alcohol.[16] The wholesaler is obligated to verify that each of its manufacturers and importers has obtained a Certificate of Label Approval from the Tax and Trade Bureau.[17] The wholesaler must further verify that each manufacturer or importer is duly licensed by Tennessee Alcoholic Beverage Commission, that each

---

[15] 27 U.S.C. § 204. The Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 201 et seq., itself acknowledges the primacy of state law, at least with respect to malt beverages. *See* 27 U.S.C. § 205 (referred to as the "Penultimate Paragraph" which provides that the tied-house provisions of the FAAA only apply to the extent that state law embodies similar provisions); *see also* 42 U.S.C. § 290bb-25b(b)(7), reauthorized in Public Law 114-255 (2016), Stop Underage Drinking Act ("Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts.").

[16] Tenn. Code Ann. § 57-3-203 (outlining the requirements for obtaining such a license).

[17] 27 U.S.C. § 205(e).

of their brands are duly registered with the Tennessee Alcoholic Beverage Commission, and that the corresponding brand registration privilege tax has been paid.[18]

In addition, the wholesaler is obligated to pay all applicable excise taxes on the alcohol.[19] Tennessee has the highest beer tax rate in the country.[20] Finally, the wholesaler must verify that each retailer to whom it delivers is duly licensed by the state, is compliant with all applicable regulations, and has remitted all applicable taxes. If the wholesaler sells products in violation of any of these obligations, which exist to facilitate

---

[18] Tenn. Code Ann. §§ 57-3-202 & 57-3-301(b).

[19] Tenn. Code Ann. §57-3-303(a). The gross receipt taxes that Tennessee wholesalers collect are paid directly to their host counties and municipalities. They are a very important source of local governmental revenue. *See State Shared Taxes in Tennessee,* Tennessee Advisory Commission on Intergovernmental Relations (https://www.tn.gov/content/dam/tn/tacir/documents/exec.pdf)

[20] *How High Are Beer Taxes in Your State?,* Tax Foundation (https://taxfoundation.org/beer-taxes-state/).

enforcement of state requirements imposed on suppliers and retailers, it is subject to fine, suspension or revocation of its license.

In turn, retailers must also obtain a state retail license as well as an Employee Permit for each employee involved with the delivery and sale of alcohol.[21] They may only purchase alcohol from a Tennessee-licensed wholesaler. They are responsible for and must secure their licensed premise. Tenn. Code Ann. § 57-3-204. The retail premise is specifically defined and must generally be compact and contiguous. The retailer is responsible for strict compliance with all alcohol regulations within the retail premises and furthermore is responsible for collecting and remitting all applicable alcohol sales taxes.

---

[21] Tenn. Code Ann. § 57-3-204 (outlining the requirements for obtaining such a license).

It would be virtually impossible for the Tennessee Alcoholic Beverage Commission to regulate effectively over 640,000 alcohol retailers scattered across the country[22] without a regulatory system that funneled all alcohol being sold in the state through in-state wholesalers and retailers who were subject to audit, control, and enforcement action by the Tennessee Alcoholic Beverage Commission. Similarly, it would be virtually impossible to collect the millions of dollars of taxes levied on alcohol sales without such a system. In short, there would be no accountable, transparent and orderly alcohol distribution market without a three-tier system.

In Tennessee, alcohol may only be sold by local option. Tenn. Code Ann. §§ 57-3-102 & 57-3-103. Of the 96 counties in Tennessee, 24 still prohibit the

---

[22] *2017 Beer Industry in Review*, NBWA (https://www.nbwa.org/resources/2017-beer-industry-review).

sale of alcohol.[23] This evidences the wide divergence of opinion among Tennessee citizens regarding this socially sensitive product. It also explains the desire and intent of its policymakers to accommodate local norms and standards in the establishment of effective alcohol regulation.

In deference to this deep divide in public opinion regarding alcohol, a retail license may only be issued to a Tennessee resident who has satisfied the durational residency requirement. The reasons for that requirement are expressed in Tenn. Code Ann. § 57-3-204 (b) (4):

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in

---

[23] *Wet and Dry Counties*, NABCA (https://www.nabca.org/sites/default/files/assets/publications/white_papers/WetDry%20Counties.pdf).

> wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

A statute that requires durational residency ensures that the applicant has a demonstrated commitment to the host community, an understanding of its local norms and standards, and a thorough knowledge of the applicable state and local laws governing the sale of alcohol. *Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013) (upholding a durational residency requirement on the officers and owners of a corporate wholesaler

licensee); *see* Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933).

III. The Congressional and Constitutional History of Liquor Regulation.

The congressional and constitutional history of alcohol illustrates the intent to safeguard the States' authority to regulate alcohol within their borders free from the dormant constraint of the Commerce Clause.

A. The Eighteenth Amendment.

Alcohol regulation was minimal in the nineteenth century.[24] In that era, America was characterized as "a nation of drunkards."[25] Temperance movements, such as the Woman's Christian Temperance Union and Anti-Saloon

---

[24] *See* Jane O'Brien, *The Time When Americans Drank All Day Long*, BBC NEWS (Mar. 9, 2015), http://www.bbc.com/news/magazine-31741615.

[25] W.J. Rorabaugh, *The Alcoholic Republic: An American Tradition* 5 (1979).

League, arose to address the problem.[26] Initially, these prohibition advocates pursued local option laws that permitted localities to ban the sale of alcohol and close tied-house saloons.[27] Thereafter, they sought similar measures statewide.[28] By the end of 1916, twenty-three states banned the sale of alcohol.[29]

As the nation grew, companies engaged in interstate commerce began challenging state statutes that barred the sale of alcohol. In the late nineteenth century, the United States Supreme Court substantially limited the authority of states to regulate liquor importation under the dormant Commerce Clause doctrine.[30]

---

[26] *Id.* at 187-222.

[27] Norman H. Clark, *Deliver Us From Evil: An Interpretation of American Prohibition*, 122-27 (1976).

[28] *Id.*

[29] *Id.* at 97 (1976).

[30] *See, e.g., Leisy v. Hardin*, 135 U.S. 100, 159–60 (1890) (holding that intoxicating liquor shipped into the state remained an article of "interstate commerce" immune from

These decisions frustrated the efforts of prohibition advocates and prompted a petition to Congress. In response, Congress passed the Wilson Act, 27 U.S.C. § 121 (1890), in order to safeguard a state's right to regulate alcohol, including the importation of alcohol into the state.[31] The Wilson Act provided that state law applied to the sale, distribution, and transportation of intoxicating liquor upon its arrival in the state. *Id.* In *Rhodes v. Iowa*, however, the Supreme Court held that the dormant Commerce Clause doctrine prohibited state regulation of direct shipments of alcohol to in-state consumers by out-of-state companies, effectively gutting the Wilson Act.[32] As a result, train stations

---

state regulation if it remained in its original package); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 500 (1888) (striking down a state law that restricted the importation of intoxicating liquor to those who possess a permit).

[31] *See* Note, *"Police Power" Under the Wilson Act of 1890*, 19 HARV. L. REV. 53, 53–54 (1905).

[32] 170 U.S. 412, 426 (1898).

began to function as retail outlets.[33] In response, Congress passed the Webb-Kenyon Act, 27 U.S.C. § 122 (1913), which authorized states to prohibit the sale, distribution, transportation, or importation of alcohol into the state in violation of its laws.[34]

Congress passed these two acts in direct response to the Supreme Court decisions that limited state authority to regulate liquor.[35] This unequivocally demonstrates the intent of Congress to make state law primary regarding the regulation of alcohol.[36] The risk that state legislation may burden interstate commerce was overridden by the desire to

---

[33] *See* Jason E. Prince, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563, 1575 (2004).

[34] *See* 49 CONG. REC. 4292 (1913). In vetoing the bill, President Taft described it as permitting "the states to exercise their old authority, before they became states, to interfere with commerce between them and their neighbors." *Id.*

[35] *See Granholm v. Heald*, 544 U.S. 460, 502–03 (2005) (Thomas, J., dissenting).

[36] *See, e.g., Dugan v. Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936); 49 CONG. REC. 2687 (1913).

respect local standards and ensure effective state regulation of liquor.[37] The constitutionality of the Webb-Kenyon Act was upheld in 1917 in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311, 332 (1917).

Flushed with success in the states and the passage of the Webb-Kenyon Act, temperance advocates then focused their efforts on a nationwide ban on the sale of alcohol. In 1917, Congress passed the Wartime Prohibition Act (grain and barley were needed for the war effort).[38] Thereafter, prohibition advocates pursued adoption of the Eighteenth Amendment, an effort that required two-thirds majority vote in both the House and Senate and a subsequent affirmative vote by three-fourths of the

---

[37] *See Dugan*, 16 F. Supp. 694 at 704.

[38] *See generally* Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 175 (1991)

states.[39] Only two states, Connecticut and Rhode Island, refused to ratify the Amendment.[40] Prohibition took effect on January 16, 1920.[41]

Prohibition proved to be a noble but failed experiment and was largely responsible for the rise of organized crime and a nationwide disregard for the law.[42] There were two lessons learned from Prohibition. First, morality-driven legislation was difficult to sustain without long-term support.[43] Second, disparate community norms and standards

---

[39] *See* Thomas Pinney, *A History of Wine in America: From the Beginnings to Prohibition* 434 (1989).

[40] *Id.*

[41] Spaeth, *supra* note 38, at 175.

[42] *See, e.g., Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850, 856 (S.D.N.Y. 1985); Nora v. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 621 (1994).

[43] *See* John D. Rockefeller, *Foreword* in Raymond Fosdick and Albert Scott, *Toward Liquor Control* (1933) ("Men cannot be made good by force. In the end, intelligent lawmaking rests on the knowledge or estimate of what will be obeyed. Law does not enforce itself.").

for alcohol precluded the imposition of a single, national regulatory standard.[44]

B. The Twenty-first Amendment.

Enacted in 1933, the Twenty-first Amendment embodied the recognition that Americans did not accept a national policy that prohibited the manufacture and sale of alcoholic beverages. U.S. CONST. amend. XXI. Noble motives alone failed to achieve prohibition and undermined the public's belief in the rule of law. The Twenty-first Amendment shifted the regulation of liquor to the level of government able to obtain broad support.[45] State, not national, regulation assumed the primary role. The ratification of the Twenty-first Amendment embedded in the Constitution the policy underlying

---

[44] *See National Prohibition Law: Hearings Before the S. Comm. on the Judiciary, Subcomm. on Bills to Amend the National Prohibition Act*, 69th Cong. 197 (1926).

[45] *See* David S. Versfelt, Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1578 (1975).

the Webb-Kenyon Act; that is, state authority was primary regarding the regulation of alcohol.

Section 2 of the Twenty-first Amendment erected a constitutional barrier to invalidation under the Commerce Clause of state alcohol regulation regarding importation, transportation, and distribution within a state. U.S. CONST. amend. XXI, § 2. The Section "[g]rants the States virtually complete control over whether to permit importation or sale of liquor, and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

As originally proposed, Section 3 of the Twenty-first Amendment conferred upon Congress concurrent power to regulate alcohol sales, but that language was not adopted.[46] Senators Blaine and

---

[46] *See* Spaeth, *supra* note 38, at 180.

Wagner objected to the section, explaining that the concept of concurrent power was inconsistent with the state power conferred under Section 2.[47] The intent of the Twenty-first Amendment and the Webb-Kenyon Act was not to encourage state legislation that burdened interstate commerce but rather to insulate states from federal interference with local norms and standards. *See Granholm v. Heald*, 544 U.S. 460, 525 (2005) (Thomas, J., dissenting). State authority over the regulation of alcohol was deemed paramount. *See United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring).

---

[47] *See* Spaeth, *supra* note 38, at 181-82. States desiring to remain dry after repeal feared that concurrent power would allow Congress to overrule a state's choice to remain dry.

C. The Twenty-first Amendment and Dormant Commerce Clause.

1. The Early Cases.

Endorsed by both Congress and state constitutional conventions, the Twenty-first Amendment was not just a narrow delegation of federal regulatory authority. The express language of the Amendment exclusively conferred on the states the authority to regulate the "transportation or importation" of intoxicating liquors, without limitation, and without rendering states subservient to federal power under the Commerce Clause.

Shortly after the Twenty-first Amendment was enacted, the Supreme Court recognized the broad authority that the Twenty-first Amendment conferred upon the states in the area of alcohol regulation.

> The Twenty-first Amendment sanctions the right of a state to legislate concerning

> intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.

See, e.g., Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (upholding a regulation on the exportation of alcoholic beverages out of the state).

The early cases specifically upheld the states' power to regulate intoxicating liquor even when it clearly burdened interstate commerce. The justification was that the control of importation is an essential component of the states' licensing and regulatory authority, and the Twenty-first

Amendment insulates this authority from a dormant Commerce Clause challenge.[48]

State regulation of intoxicating liquor, however, was not necessarily free from all constitutional limitations. As noted in *Granholm*, "the Court has held that state laws that violate other provisions [than the Commerce Clause] of the Constitution are not saved by the Twenty-first Amendment. *Granholm*, 544 U.S. at 486-87.[49]

Clearly, the Twenty-first Amendment was intended to limit application of the Commerce Clause

---

[48] *See Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939), *abrogated by Granholm v. Heald*, 544 U.S. 460 (2005); *Finch v. McKittrick*, 305 U.S. 395, 397 (1939), *abrogated by Granholm v. Heald*, 544 U.S. 460 (2005).

[49] *See, e.g. 44 Liquor Mart, Inc. v. Rhode Island*, 517 U.S. 484, 514–16 (1996) (deciding the Twenty-first Amendment does not sanction violations of the First Amendment); *Larkin v. Grendel's Den*, 459 U.S. 116, 120–27 (1982) (recognizing an alcohol zoning decision violated the Establishment Clause); *Craig v. Boren*, 429 U.S. 190, 206 (1976) (holding the Twenty-first Amendment does not limit a claim under the Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 434 (1971) (deciding the Twenty-first Amendment does not limit the Due Process Clause when the Government seeks to publicly post a one-year restriction on the consumption of alcohol for a citizen).

to state liquor laws to at least some extent. Prior to 1984, the only state liquor statutes which had been declared invalid as violative of the Commerce Clause were those which were extraterritorial in effect[50] or which were preempted by conflicting federal law. The *Bacchus*[51], *North Dakota*,[52] and *Granholm*[53] cases discussed below highlight the subsequent evolution of jurisprudence in this area and the Court's achievement of a balance between state authority under the Twenty-first Amendment and federal authority under the Commerce Clause.

---

[50] *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 343 (1989) (striking down a price affirmation statute with extraterritorial effect); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–85 (1986) (striking down a N.Y. pricing statute that, in effect, controlled the process of intoxicating liquor in neighboring states).

[51] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

[52] *North Dakota v. U.S.* 495 U.S. 423 (1990).

[53] *Granholm v. Heald*, 544 U.S. 460, 466 (2005).

2. Bacchus, North Dakota, and Granholm.

In *Bacchus Imports, Ltd. v. Dias*, the Court addressed the authority of the state to differentiate between in-state and out-of-state producers in a manner that benefited the former and discriminated against the latter. 468 U.S. 263, 265 (1984). The case involved a Hawaii tax on all intoxicating liquors except two locally produced products, ti root brandy and pineapple wine. *Id.* The Court held the Hawaii tax was unconstitutional on the basis that it "favor[ed] local liquor industries" and therefore was preempted by the "strong federal interest in preventing economic Balkanization." *Id.* at 276. The Court indicated that the dormant Commerce Clause doctrine prohibited States from favoring "local liquor industries by erecting barriers to competition." *Id.* Significantly, the relevance of the Webb-Kenyon Act

was never argued to the Court. *Id.* Hawaii did not even raise the Twenty-first Amendment as a defense until it submitted its final brief to this Court. Reply Brief for Appellants, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (No. 82-1565), 1983 U.S. S. Ct. Briefs LEXIS 597, at *5. The majority opinion found this "belated" argument unconvincing. *See Bacchus*, 468 U.S. at 276.

In the 1990 decision of *North Dakota v. U.S.*, 495 U.S. 423 (1990), the Court, in a plurality opinion, reaffirmed that states have "virtually complete control" over "the importation and sale of liquor and the structure of liquor distribution system" within their borders. *Id.* at 431 (involving a positive Commerce Clause challenge) (citations omitted). Because the two challenged North Dakota regulations requiring the purchase from physically present licensed wholesalers fell "within the core of

the State's power under the Twenty-first Amendment", the Court held that the regulations were "supported by a strong presumption of validity and should not be set aside lightly." *Id* at 433 (citing *Capital Cities* 467 U.S. at 714). As such, the regulations were shielded from preemption under the Supremacy Clause.

In 2005, the Court in a 5 to 4 decision again addressed the issue of whether and to what extent state liquor laws were subject to a dormant Commerce Clause challenge. *Granholm v. Heald*, 544 U.S. 460, 466 (2005). The Court first considered whether the challenged New York and Michigan laws, which permitted in-state wineries from shipping direct but prohibited out-of-state wineries from doing so, discriminated between in-state and out-of-state wineries in a manner that benefited the former and burdened the latter. *Id.* at 472–75. The

Court concluded that the direct shipping laws granted in-state wineries access to each State's consumers on preferential terms. *Id.* at 466. ("[T]he object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint."). Accordingly, the Court had "no difficulty" concluding that the New York and Michigan laws discriminated against interstate commerce. *Id.* at 474–76.

The Court then addressed the reach of the Twenty-first Amendment, specifically whether the "state alcohol [regulations were] limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487 (alteration in original) (citing *Bacchus*, 468 U.S. at 276). It began its analysis by noting that it had previously held that the Twenty-

first Amendment does not save state liquor laws that violate other provisions of the Constitution.

The Court then considered the central issue in the case: whether state liquor laws were subject to dormant Commerce Clause challenge, or whether the Twenty-first Amendment provided states with the authority to pass non-uniform liquor laws and discriminate against out-of-state producers and their products. *See Granholm*, 544 U.S. at 484–85. To answer the inquiry, the Court examined the legislative history of the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment. *Id.* The Court concluded that Section 2 of the Amendment was only intended to confer upon states the immunity as provided by Wilson and Webb-Kenyon, and Section 2 and the two acts were not intended to insulate all state liquor laws from the nondiscrimination principle embodied in the

Commerce Clause. *See id.* Therefore, certain facially discriminatory laws which implicated federal interests would only be upheld if they met the rigorous dormant Commerce Clause test; namely, the challenged laws would only be upheld if they advanced legitimate state interests "that cannot be adequately served by reasonable nondiscriminatory alternatives." *See id.* at 489.[54]

In *Granholm*, the laws in question, which discriminated against out-of-state producers, could not meet this rigorous test and, accordingly, were struck down as violative of the dormant Commerce Clause doctrine. *See id.* at 493. The Court, however,

---

[54] Justice Kennedy's opinion in *Granholm v. Heald* 540 US 460 (2005) references the purported existence of a "Model Direct Shipping Bill" attributed to the National Conference of State Legislatures (NCSL). *Id.* at 491. Justice Kennedy proffered this model bill as some form of "least restrictive alternative" to the challenged statutes. However, there is no NCSL Model Bill. (http://www.ncsl.org/ncsl-in-dc/standing-committees/communications-financial-services-and-interstate-commerce/memo-regarding-model-wine-shipping-bill.aspx).

was careful to include language outlining the limits of its decision:

> The States argue that any decision invalidating their direct shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

Id. at 488–89 (citations omitted).

Of particular note are the last three sentences of the above-quoted paragraph where the Court limited its decision to discrimination "*in favor of local producers.*" *Id.* at 489 (emphasis added). The Court further highlighted this limitation by noting that "[w]ithout demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage *out-of-state . . . producers.*" *Id.* at 493 (emphasis added).

This carefully chosen language illustrates the Court's attempt to balance the federal interest in interstate commerce under the Commerce Clause with the state's interest in controlling importation and structuring the liquor distribution system with its borders under the Twenty-first Amendment. Discriminating against *out-of-state producers* and their products implicated Congress' Commerce power. *See id.* at 489. Structuring a distribution

system *within its borders* implicated the states' Twenty-first Amendment power. *Id.* The Court thus inferred that this distinction would determine the reach of the dormant restraints of the Commerce Clause.

Accordingly, *Granholm* upheld the paramount authority of states to regulate wholesalers and retailers within their borders free from the constraints of the Dormant Commerce Clause doctrine. *Id.* at 488–90. Any other interpretation of *Granholm* renders the Amendment essentially meaningless.

3. Arnold's Wines, Brooks, and Southern Wine.

The Second, Fourth, and Eighth Circuits have adopted and applied this interpretation of the *Granholm* decision. In *Arnold's Wines*, an Indiana retailer challenged a New York law that prohibited

unlicensed, out-of-state retailers from selling and delivering alcohol directly to New York consumers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 186–87 (2d Cir. 2009). The Second Circuit Court of Appeals noted that the case required it "to chart a course between two constitutional provisions that delineate the boundaries of a state's power to regulate commerce:" namely, the Twenty-first Amendment and the Commerce Clause. *Id.* at 186.

The *Arnold's Wines* court discussed the *Granholm* decision at length. *See id.* at 189–92. Reconciling the constitutional conflict, the Second Circuit noted the following:

> *Granholm* is best seen as an attempt to harmonize prior Court holdings regarding the power of the states to regulate alcohol within their borders—a power specifically granted to the states by the Twenty-first Amendment—with the broad policy concerns of the Commerce Clause. *Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic

> beverages under the Twenty-first Amendment. It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause.

Id. at 190 (citations omitted).

Relying upon the *Granholm* conclusion that the three-tier system is "unquestionably legitimate," the *Arnold's Wines* court unanimously upheld the challenged law on the basis that the Twenty-first Amendment conferred upon New York the authority to structure the distribution system within the state as it saw fit. *Id.* at 190–91.

The Fourth Circuit Court of Appeals also considered similar issues. *Brooks v. Vassar*, 462 F.3d 341, 344 (4th Cir. 2006). The case involved the Virginia Personal Import Exception[55] to the three-tier system that limited the amount of wine and beer

---

[55] Va. Code Ann. § 4.1-310 (2007).

that Virginia consumers could personally transport into the state for their personal consumption. The court rejected the argument that this discriminated against out-of-state retailers and violated the dormant Commerce Clause doctrine. *See id.* at 352. Judge Niemeyer noted that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." *Id.*

Similarly, *Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control* 731 F.3d 799, 802 (8th Cir. 2013) involved a dormant Commerce Clause challenge to a Missouri statute regulating wholesalers. 731 F.3d 799, 802 (8th Cir. 2013). The Missouri law embodied a

durational residency requirement for corporate liquor wholesalers and their majority owners, directors, and officers. *See id.* at 802–03. Southern Wine and Spirits of America, Inc. was denied a Missouri liquor wholesaler license on the basis that it was a Florida-based corporation. *See id.* at 803. The Eighth Circuit framed the central issue in the case as follows: "whether the residency requirement applicable to the wholesale tier of Missouri's liquor distribution system, which is otherwise impermissible under Commerce Clause jurisprudence, is authorized by [Section] 2 of the Twenty-first Amendment." *Id.* at 807 (alteration in original).

Citing *Granholm*, the Eighth Circuit held that "state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and

producers are 'protected under the Twenty-first Amendment.'" *Id.* at 809 (citing *Granholm*, 544 U.S. at 489). The court rejected *Southern Wine*'s argument that only "integral" aspects of the three-tier system were immune from Dormant Commerce Clause challenge and that a residency requirement was not such an integral component. *See id.* at 810. In the court's view, "[t]here is no archetypal three-tier system," and states are free under the Twenty-first Amendment to structure that system as they see fit. *Id.* Upholding the statute, writing for the court, Judge Colloton articulated the public policy underlying Missouri's residency requirement as follows:

> The legislature legitimately could believe that a wholesaler governed predominantly by Missouri residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities—

> drunk driving, domestic abuse, underage drinking—that liquor distribution may produce. Missouri residents, the legislature sensibly could suppose, are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-today in ballparks, churches, and service clubs. The legislature logically could conclude that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts.

Id. at 811.

The challenged statute sets forth the requirements that an applicant for a Tennessee retail license must satisfy. It is a component of Tennessee's liquor distribution system within the state. As such, the statute falls within the state's "core concerns" or "core powers" under the Twenty-first Amendment and is free from the constraints established by the dormant Commerce Clause

doctrine. *See Granholm*, 544 U.S. at 488-89 (quoting *Midcal Aluminum, Inc.*, 445 U.S. at 100).[56]

As noted by Judge Colloton with respect to a similar Missouri statute:

> The residency requirement defines the extent of in-state presence required to qualify as a wholesaler in the three-tier system. . . . If it is beyond question that States may require wholesalers to be "in-state" without running afoul of the Commerce Clause, *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), then we think States have flexibility to define the requisite degree of "in-state" presence to include the in-state residence of wholesalers' directors and officers, and a super-majority of their shareholders.

Southern Wine, 731 F.3d at 810-11.[57] The challenged statute does not differentiate between in-state or out-

---

[56] The Fifth Circuit also adopted this interpretation of *Granholm*. *See Wine Country Gift Baskets.com vs. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) ("*Granholm* prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries."); *but see Cooper v. Texas Alcoholic Beverage Commission*, 820 F.3d 730 (5th Cir. 2016). The *Cooper* decision can perhaps be best understood as the attempt by one divided panel of the Fifth Circuit to reconcile a 22-year-old precedent and long-standing injunction with the evolving Twenty-first Amendment jurisprudence.

of-state producers or products. It simply requires corporate alcohol retailers and their majority owners, directors, and officers to be residents of the state. As such, the requirement is protected by the Twenty-first Amendment and Respondents' dormant Commerce Clause challenge fails.

IV. State Liquor Laws Structuring the Distribution System Within the State's Borders are Entitled to Extraordinary Deference Under the Twenty-first Amendment.

As noted by Judge Calabresi in his concurring opinion in *Arnold's Wines*, "[t]he evolving interpretation of the Twenty-First Amendment raises important questions about the role of courts." *Arnold's Wines, Inc.*, 571 F.3d at 197. Judge Calabresi warned against the dangers of judicial

---

[57] While there may be a split among the Circuits regarding durational residency requirements applicable to retailers, there is no split regarding durational residency requirements applicable to wholesalers.

interpretation designed to "update" what some view as anachronistic laws, particularly when those laws are embedded in the Constitution. *See id.* at 197–201.

> It may permit courts, especially well-meaning ones, to substitute their own notions of modern needs for those of the majority. Moreover, when a rereading results in the erection of a constitutional barrier, it may remove serious issues from the democratic process and from legislative deliberation. . . . Additionally, this sort of updating presents another problem, and one that is especially apparent in the context of the Twenty-First Amendment: It can leave state legislatures and lower federal courts with no firm understanding of what the law actually is.

Id. at 200 (citations omitted).[58]

Justice Frankfurter, in *Carter v. Virginia*, 321 U.S. 131, 142 (1944) warned of similar dangers:

> "It is now suggested that a State must keep within "the limits of reasonable necessity,"

---

[58] There have been over 1,700 amendments to state liquor laws in just the past six years. ***State-Level Alcohol Laws Face A Federal Challenge in the Supreme Court,*** Leonine Public Affairs (http://www.leoninepublicaffairs.com/focus/state-level-alcohol-laws-face-federal-challenge-supreme-court/)

and that this Court must judge whether or not Virginia has adopted "regulations reasonably necessary to enforce its local liquor laws." Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment... Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a "reasonable regulation" of the liquor traffic...And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play."[59]

---

[59] Multiple circuit courts likewise recognize the dangers of a federal court acting as a state legislature on alcohol issues. As Judge O'Scannlain has identified, "the district court's suggestion that the State should serve its interest in some other way disparages the policy choices that Section 2 of the Twenty-First Amendment commits to the states." *Costco v. Hoen*, 522 F.3d 874, 903, n. 25 (9th Cir. 2008). In a well-crafted concurring opinion, Judge Hamilton expresses his view as follows: "In my view of the applicable law, the Twenty First Amendment to the Constitution should foreclose balancing tests when the state is exercising its core Twenty-First Amendment power to regulate the transportation and importation of alcoholic beverages for consumption in the state." *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 462 (7th.Cir. 2012) (J. Hamilton concurring). Judge Southwick has articulated that "regulating alcoholic beverage retailing is largely a State's prerogative." *Wine Country*, 612 F.3d at 820. Judge Colloton similarly noted that "there is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned. States have discretion to establish their own

The intersection of the Twenty-first Amendment and dormant Commerce Clause doctrine may lure courts too far down the road of policymaking under the guise of judicial review. The need for caution in the exercise of judicial review is particularly critical concerning alcohol regulations for two reasons.

First, by its nature, all alcohol regulation fundamentally represents a balance between unfettered competition and availability, on the one hand, and strict control, on the other. Competition implicates federal interests under the Commerce Clause. Control implicates State interests under the Twenty-first Amendment. State Legislatures, according to local norms and standards, must determine how that balance should be achieved and where the appropriate balance point should be fixed.

---

versions of the three-tier system[.]" *Southern Wine*, 731 F.3d at 810.

That subjective judgment, forged within the give and take of the political arena, by the community's local, elected representatives, should not be lightly set aside. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (equal protection challenge). Second, these particular legislative judgments enjoy a special status by virtue of the Twenty-first Amendment and, accordingly, are entitled to the greatest deference by any reviewing Court.

The tumultuous history of liquor regulation should serve as a warning to courts against traveling too far down the road of policymaking under the guise of judicial review. Incrementally invalidating key provisions of a state's liquor regulatory scheme can lead to unintended consequences by pulling a thread that threatens to unravel the entire regulatory fabric. It can also undermine or perhaps

even cripple the ability of the state to effectively regulate the industry.

The judgment of the Tennessee Legislature to require durational residency for a retail license falls within its Twenty-first Amendment authority. While other policymakers might draw that line differently, NBWA suggests that the courts should allow different legislatures to construct or deconstruct liquor regulations in their states on an incremental basis as each sees fit.

CONCLUSION

For the foregoing reasons, NBWA respectfully requests that the Court reverse the Sixth Circuit decision and uphold the constitutionality of the challenged statute.

Respectfully Submitted,

Dated: November 20, 2018

Michael D. Madigan
Counsel of Record
Brandt Erwin
Madigan, Dahl & Harlan, P.A.
222 South Ninth Street
Suite 3150
Minneapolis, Minnesota 55415
612-604-2000
madigan@mdh-law.com
erwin@mdh-law.com

Paul E. Pisano
National Beer Wholesalers Association
1101 King Street, Suite 600
Alexandria, Virginia 22314
703-683-4300

No. 18-96

IN THE
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,
v.
CLAYTON BYRD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

LISA E. SORONEN
Executive Director
State and Local Legal Center
444 N. Capitol St., N.W.
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

RICHARD A. SIMPSON
Counsel of Record
Tara L. Ward
Emily S. Hart
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
rsimpson@wileyrein.com

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. This Court should uphold the Tennessee residency requirement for first-time liquor licenses and reverse the Sixth Circuit's decision because the Twenty-first Amendment provides States exceedingly wide latitude to regulate the sale of alcohol. ... 8

A. The Twenty-first Amendment defers to the States as to how to regulate the importation and use of alcohol within their borders. 8

B. The dormant Commerce Clause places minimal, if any, limitations on the right of States under the Twenty-first Amendment to regulate alcohol. 9

II. At a minimum, the Court should uphold State regulations dealing with alcohol so long as there is any rational basis on which the State could have determined that the regulation serves a legitimate state interest. 11

TABLE OF CONTENTS
(continued)

Page

A. The Court should apply a deferential and lenient rational basis test that balances dormant Commerce Clause concerns with the broad power afforded to States through the Twenty-first Amendment.....11

B. States and local governments need broad discretion to develop specialized alcohol regulatory schemes because they have a distinct special interest. 16

III. States and local governments' ability to effectively regulate alcohol has broad implications for other substances that also have a special local impact. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 13

Brown-Forman Distillers Corp., v. New York State Liquor Auth.,
476 U.S. 573 (1986) 13

Byrd v. Tennessee Wine & Spirits Retailers Ass'n,
883 F.3d 608 (6th Cir. 2018) 15

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 8, 12

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

Healy v. Beer Inst.,
491 U.S. 324 (1989) 13

Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Michigan,
305 U.S. 391 (1939) 10

New York v. United States,
505 U.S. 144 (1992) 13

North Dakota v. United States,
495 U.S. 423 (1990) 9, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799 (8th Cir. 2013) 13

State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59 (1936) 4, 8, 10, 11

Whalen v. Roe, 429 U.S. 589 (1977) 20

Other Authorities

American Bar Assoc. Board of Governors, Task Force on the Model Definition of the Practice of Law, Appendix A, *State Definitions of the Practice of Law* (Aug. 8, 2018) 17

CDC, *Excessive Drinking is Draining the U.S. Economy* (July 13, 2018)..... 17

Daniel I. Rees & Kevin T. Schnepel, *College Football Games and Crime*, Cornell University ILR School (Jan. 2008) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

NAHB, *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances* (June 2007) 17

National Conference of State Legislatures, *2018 Preschool-3rd Grade Education Legislation Tracker* (May 22, 2018) 16

National Conference of State Legislatures, *Prescribing Policies: States Confront Opioid Overdose Epidemic* (Oct. 31, 2018) 20

National Conference of State Legislatures, *State Medical Marijuana Laws* (Nov. 8, 2018) 19

Sasha Savitsky, *Country Music's Drinking Problem: Alcohol-Related Incidents at Concerts Getting Out of Hand?*, Fox News Network (Aug. 8, 2014) 16

U.S. Dept. of Transportation, National Highway Traffic Safety Administration, *Alcohol-Impaired Driving*, 7 (Nov. 2018) 18

INTEREST OF AMICI CURIAE*

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is

---

* No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been docketed.

represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

State and local governments have broad responsibilities for regulating private conduct within their respective jurisdictions. That responsibility includes repealing and modifying laws over time as additional information becomes known and as the views of citizens evolve and change. State and local officials are responsible to the citizens who elected them for the decisions they make regarding how to regulate private conduct.

The decision below invalidated a state law regulating the sale of alcohol on the ground that the

law violates the dormant Commerce Clause. In doing so, that decision failed to give appropriate weight to the extraordinarily broad discretion given to the States by the Twenty-first Amendment to regulate sale and use of alcohol within their borders. This Court's decision will have a substantial impact on the rights and responsibilities of state and local governments to regulate conduct within their jurisdictions.

SUMMARY OF ARGUMENT

This Court's analysis of the Twenty-first Amendment makes clear that States enjoy broad power to regulate the sale and use of alcohol within their borders. Early cases suggest that there are no dormant Commerce Clause limitations on that power. *See State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936). More recent cases do not go that far but continue to recognize that "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm v. Heald*, 544 U.S. 460, 484 (2005). It is within this context that the Court should consider Tennessee's two-year durational residency requirement for retail alcohol sales licenses at issue in this case.

The text and history of the Twenty-first Amendment demonstrate that States should be free to regulate alcohol with minimal, if any, limitations imposed by the dormant Commerce Clause. For the reasons explained by the dissents in *Granholm*, there is a compelling argument that state regulation should be entirely exempt from dormant Commerce Clause review. The Court need not go nearly that far, however, to recognize that Tennessee's two-year residency requirement for a retail license falls well within the authority of the States to regulate alcohol.

Application of the dormant Commerce Clause and Twenty-first Amendment is often presented as a binary choice: either the non-discrimination principle of the dormant Commerce Clause applies with full force to State regulation of alcohol or there are no

dormant Commerce Clause limitations whatsoever on state laws regulating alcohol.

Amici propose, without revisiting *Granholm*, that the Court can and should reconcile these divergent approaches by adopting an exceedingly deferential standard for dormant Commerce Clause review of state alcohol regulation. In particular, a State regulation of alcohol should be upheld if there is any possible rational basis for the regulation based on a legitimate State interest in controlling the sale and use of alcohol within the State. The dormant Commerce Clause should be held to invalidate a State regulation of alcohol only if there is no rational basis for the regulation other than discrimination against out-of-state economic interests. By adopting this kind of rational basis test, the Court would honor the special power and discretion afforded to State regulation of alcohol under the Twenty-first Amendment, while at the same time preserving the core purpose of the dormant Commerce Clause by prohibiting State regulations that could have no purpose other than blatant discrimination against out-of-state economic interests.

The proposed test harmonizes the Court's cases and important principles at stake by affording the States exceedingly broad discretion to regulate alcohol within their own borders, but at the same time prohibiting States from attempting to regulate out-of-state economic activity (as, for example, with price-affirmation statutes) and from enacting regulations that could have no purpose other than to benefit in-state economic interests at the expense of out-of-state economic interests. The proposed test also recognizes that the Twenty-first Amendment

was intended to limit severely the Commerce Clause limitations on state power to regulate alcohol, but does not immunize or limit state laws from review under other provisions of the Constitution, such as the Equal Protection Clause of the Fourteenth Amendment.

The Sixth Circuit in the decision below read *Granholm* as requiring application of the non-discrimination principle in neutral fashion, with the courts scrutinizing the intent and effect of State regulation of alcohol as though it were an ordinary article of commerce. But if that were the correct approach, the legitimacy of the three-tier system itself would be in question, since that system certainly has a negative impact on out-of-state economic interests. Instead, courts should review State regulation of alcohol with a heavy thumb on the scale in favor of upholding the regulation, striking it down only if there could be no rational basis on which the regulation serves a legitimate interest in regulating alcohol and instead could have no purpose other than discrimination against out-of-state economic interests. Under that standard, the Tennessee two-year residency requirement easily passes muster.

Affording that kind of deference to State regulation of alcohol makes sense because States and local governments bear the brunt and cost of problems associated with alcohol sales and use. Those problems include, for example, vandalism, looting, and other damage due to drunk-and-disorderly behavior following sporting and music events where alcohol consumption is high. Abuse of alcohol also impacts workplace productivity, health

care expenses, law enforcement and criminal justice expenses, and motor vehicle crashes, including drunk driving. The impact of these problems varies widely from State to State, as do local conditions and views. States and municipalities need regulatory flexibility to address these critical issues at a local level. The proposed rational basis test ensures that States have the discretion they need to deal with these issues.

The practical implications of the decision below extend well beyond the production, manufacture, and retail sale of alcohol. For example, States and local governments face difficult questions regarding the level and nature of regulation necessary to curb opioid and marijuana abuse. States and local governments should be given deference as they struggle with these local problems. A decision invalidating Tennessee's two-year residency requirement for a retail alcohol sales license, notwithstanding the special power accorded the States by the Twenty-first Amendment, would call into serious question States' ability to deal creatively with other serious, localized issues not afforded special attention under the Constitution.

ARGUMENT

I. This Court should uphold the Tennessee residency requirement for first-time liquor licenses and reverse the Sixth Circuit's decision because the Twenty-first Amendment provides States exceedingly wide latitude to regulate the sale of alcohol.

A. The Twenty-first Amendment defers to the States as to how to regulate the importation and use of alcohol within their borders.

This Court's analysis of the Twenty-first Amendment makes clear that "States enjoy broad power . . . to regulate the importation and use of intoxicating liquor within their borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Reviewing Section Two of the Twenty-first Amendment for the first time, the Court held that "the words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes." *Young's Mkt. Co.*, 299 U.S. at 62. In that regard, the Court recognized that limiting "this broad command" to dictate that States must allow "imported liquors [to] compete with the domestic on equal terms" would "involve not a construction of the amendment, but a rewriting of it." *Id.*

Decades later, the Court still recognizes that "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*,

544 U.S. at 484. For that reason, "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota v. United States*, 495 U.S. 423, 431 (1990).

It is within this context—the broad power afforded to States by the Twenty-first Amendment to regulate alcohol within their borders—that the Court should consider the constitutionality of the Tennessee durational-residency statute at issue.

B. The dormant Commerce Clause places minimal, if any, limitations on the right of States under the Twenty-first Amendment to regulate alcohol.

The text and history of the Twenty-first Amendment demonstrate that States should be free to regulate alcohol with minimal, if any, limitations imposed by the dormant Commerce Clause.

In *Granholm*, the Court reasoned that because the Twenty-first Amendment "does not abrogate Congress' Commerce Clause powers with regard to liquor," "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 487. For that reason, the majority in *Granholm* held that the States' broad regulatory power under the Twenty-first Amendment did not extend to "allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers." *Id.* at 493.

However, as the dissents in *Granholm* emphasized, alcohol is not "an ordinary article of

commerce." *Id.* at 494 (Stevens, J., dissenting); *id.* at 525 (Thomas, J., dissenting). To the contrary, alcohol is the subject of a specific constitutional amendment giving the States sweeping regulatory power, so sweeping that it is reasonably read to render State regulation of alcohol immune from dormant Commerce Clause review. *See id.* at 525 ("[T]he Twenty-first Amendment likewise insulates state liquor laws from negative Commerce Clause scrutiny.").

The dissents in *Granholm* cited the Court's early cases interpreting the scope of the Twenty-first Amendment, which set forth States' "right to discriminate in its regulation of out-of-state alcohol." *Id.* at 495 (Stevens, J., dissenting). Notably, the Court in *State Board of Equalization of California v. Young's Market Company* characterized intervention into States' liquor regulatory rights as "involv[ing] not a construction of the amendment, but a rewriting of it." *Young's Mkt. Co.*, 299 U.S. at 62. A few years later, the Court concluded that "[t]he right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Michigan*, 305 U.S. 391, 394 (1939). The Court's early analyses of the Twenty-first Amendment, close in time to the amendment's passage, were best positioned to hit on the amendment's intended scope and purpose.

Considering the broad reach of the Twenty-first Amendment and the Court's original interpretation of it, there is a compelling argument that the dissents in *Granholm* are correct in asserting that state regulation of alcohol should be

entirely exempt from dormant Commerce Clause review.

II. At a minimum, the Court should uphold State regulations dealing with alcohol so long as there is any rational basis on which the State could have determined that the regulation serves a legitimate state interest.

A. The Court should apply a deferential and lenient rational basis test that balances dormant Commerce Clause concerns with the broad power afforded to States through the Twenty-first Amendment.

Although there are compelling arguments for overturning *Granholm*, the Court need not go nearly that far to recognize that Tennessee's two-year residency requirement for an initial retail license, at issue in this case, falls well within the authority of the States to regulate alcohol.

Application of the dormant Commerce Clause and the Twenty-first Amendment is often presented as a binary choice. On one hand, some cases suggest that the dormant Commerce Clause's non-discrimination principle applies with full force to State regulation of alcohol, at least beyond the unquestioned right of the States to prohibit sales of alcohol altogether or to limit their sale to state stores or the three-tier system. *See, e.g.*, *Granholm*, 544 U.S. at 472. In contrast, other cases suggest that there are no dormant Commerce Clause limitations whatsoever on state laws regulating alcohol. *See, e.g.*, *Young's Mkt. Co.*, 299 U.S. at 62.

Amici propose, without revisiting the debate in *Granholm*, that the Court should recognize that any dormant Commerce Clause review of state alcohol regulation should be exceeding deferential. In particular, the Court should apply a lenient rational basis test when reviewing the permissibility of State regulation of alcohol. Under that approach, a State regulation of alcohol should be upheld if there is any possible rational basis for the regulation other than discrimination against out-of-state economic interests. The Court should not look behind a State regulation to make an independent judgment about its primary intent, purpose, or effectiveness; if there is any rational basis for the regulation, it should be upheld.

By adopting this kind of rational basis test, the Court would honor the special power and discretion afforded to State regulation of alcohol under the Twenty-first Amendment, while at the same time preserving the core purpose of the dormant Commerce Clause by prohibiting State regulations that could have no purpose other than blatant discrimination against out-of-state economic interests. The test harmonizes the principle that although the Twenty-first Amendment "does not abrogate Congress' Commerce Clause powers with regard to liquor," *Granholm*, 544 U.S. at 487, the amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities Cable, Inc.*, 467 U.S. at 712.

Also relevant here, apart from the Twenty-first Amendment itself, is the general principle that Congress cannot dictate to States how they must regulate private conduct within their jurisdictions.

Congress has broad powers to regulate private conduct itself and to preempt a field, but may not direct States as to how they must regulate private conduct not otherwise preempted. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). Where, as here, Congress has not acted to preempt the field, States should be and are given substantial deference as to how to govern.

Using Amici's proposed rational basis test, the Court would differentiate between a purely "protectionist tax exemption" with no purpose other than to economically benefit in-state producers, wholesalers, and retailers, and the legitimate "regulation of the three-tier distribution system." *See S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 807 (8th Cir. 2013) (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)); *Bacchus*, 468 U.S. at 276 ("State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.").

This approach is not inconsistent with the Court's decisions regarding price-affirmation statutes requiring alcohol to be sold at prices at or below those in neighboring states. *See Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp., v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *see also* Brief for Petitioner at 40-41. A

lenient rational basis test recognizes that the Twenty-first Amendment affords States sweeping power to regulate alcohol within their own borders. Price affirmation statutes, on the other hand, reflect actions by States indirectly to regulate conduct in other States, outside the purview of the Twenty-first Amendment.

Furthermore, the Twenty-first Amendment does not immunize or limit state laws from review under provisions of the Constitution other than the Commerce Clause, such as the Equal Protection Clause of the Fourteenth Amendment. A minimal rational basis test recognizes that the purpose of the Twenty-first Amendment was to give States freedom from what otherwise would be restrictions imposed by the dormant Commerce Clause on their ability to regulate in-state commerce with regard to alcohol. The Twenty-first Amendment does not, however, exist in a vacuum and so does not free States from other constitutional limitations.

This Court has repeatedly held that "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment," requiring separate licenses for producers, wholesalers, and retailers, *Granholm*, 544 U.S. at 466, and that this system is "unquestionably legitimate." *North Dakota*, 495 U.S. at 432. No case has questioned that conclusion, and rightly so.

Yet, the Sixth Circuit in the decision below read *Granholm* as requiring application of the non-discrimination principle in neutral fashion, with the courts scrutinizing the intent and effect of State regulation of alcohol as if it were an ordinary article

of commerce. If that were the correct approach, the legitimacy of the three-tier system itself would be in question, since that system certainly has a negative impact on out-of-state economic interests.

The three-tier system is "unquestionably legitimate" because when courts review State regulations of alcohol they should do so with a heavy thumb on the scale in favor of upholding the regulation. So long as there is any rational basis other than economic discrimination for the State regulation, it should be upheld, even if a court might strongly suspect that the real reason for the regulation is economic discrimination. The States are entitled to the widest possible discretion in regulating alcohol.

Applying a rational basis test, Tennessee's two-year durational residency requirement to obtain an initial retail liquor license is a legitimate use of Tennessee's power under the Twenty-first Amendment. As Judge Sutton explained in his dissent below, regulation of alcohol retailers is "critical to serving [the] interests" of "responsible consumption and orderly liquor markets" in particular because retailers are the "final link in the distribution chain." *See Byrd v. Tennessee Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 633 (6th Cir. 2018) (Sutton, J, dissenting); *see also* Brief for Petitioner at 47-51 (discussing public policy reasons for two-year durational residency requirements for individual license applicants, concluding that the requirement "cannot be dismissed as mere economic protectionism").

B. States and local governments need broad discretion to develop specialized alcohol regulatory schemes because they have a distinct special interest.

States and local governments bear the brunt and cost of problems associated with alcohol sales. For example, vandalism, looting, and other damage due to drunk-and-di. rderly behavior have long followed sporting and music events where alcohol consumption is high. *See, e.g.*, Daniel I. Rees & Kevin T. Schnepel, *College Football Games and Crime*, Cornell University ILR School (Jan. 2008), *available at* http://digital commons.ilr.cornell.edu/workingpapers/72/ (confirming that local communities register dramatic increases in assaults, vandalism, and arrests on game days); Sasha Savitsky, *Country Music's Drinking Problem: Alcohol-Related Incidents at Concerts Getting Out of Hand?*, Fox News Network (Aug. 8, 2014), *available at* https://www.foxnews.com/entertainment/country-musics-drinking-problem-alcohol-related-incidents-at-concerts-getting-out-of-hand (describing a country music concert in Massachusetts in which 46 people were treated for alcohol-related illnesses and 50 people were arrested, and a New Jersey concert in which more than 100 people were arrested).

States and local governments are given broad latitude to regulate issues that are local in nature. Indeed, States and local governments are empowered to address issues ranging from education and taxation, to zoning ordinances and land use, to attorney and medical professional licensing differently, and have done so. *See, e.g.*, National Conference of State Legislatures, *2018 Preschool-3rd*

Grade Education Legislation Tracker (May 22, 2018), *available at* http://www.ncsl.org/research/education/2018-preschool-3rd-grade-education-legislation-tracker.aspx (showing State legislation regarding P-3 education at the state level); NAHB, *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances* (June 2007) (capturing zoning ordinances across the States); American Bar Assoc. Board of Governors, Task Force on the Model Definition of the Practice of Law, Appendix A, *State Definitions of the Practice of Law* (Aug. 8, 2018), *available at* https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/ (summarizing State approaches to law licensing).

States should certainly be afforded broad latitude to tailor alcohol regulation on a local basis. The Centers for Disease Control and Prevention report that the cost of excessive alcohol use—costs resulting from loss in workplace productivity, health care expenses, law enforcement and criminal justice expenses, and motor vehicle crashes—reached $249 billion in 2010, where two out of every five dollars were paid by federal, state, and local governments. And the cost to States varied widely. CDC, *Excessive Drinking is Draining the U.S. Economy* (July 13, 2018), *available at* https://www.cdc.gov/features/costsofdrinking/index.html (excessive alcohol use costs ranged from $488 million in North Dakota to $35 billion in California, with the District of Columbia hosting the highest cost per person, and New Mexico the highest cost per drink).

Of course, the stakes can be even higher. According to the U.S. Department of Transportation, drunk driving incidence differs dramatically across the States. *See* U.S. Dept. of Transportation, National Highway Traffic Safety Administration, *Alcohol-Impaired Driving*, 7 (Nov. 2018), *available at* https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630 (reporting that in 2017, the number of drunk driving fatalities ranged from 23 in the District of Columbia and 44 in Vermont on the low end, to 3,074 in California and 3,538 in Texas on the high end; Tennessee had 962 drunk-driving-related fatalities).

Amici's proposed rational basis test gives States and municipalities the regulatory flexibility they need to address these critical issues at a local level. At the same time, by not negating entirely the dormant Commerce Clause, the proposed test protects against regulations that manifestly have no possible purpose other than to discriminate against out-of-state economic interests.

Accordingly, to resolve this case, the Court should ask whether Tennessee could have a rational basis for concluding that a two-year durational residency requirement serves a legitimate State interest in regulating alcohol. The regulation should be upheld unless it could have no purpose other than discrimination against out-of-state economic interests. Under that test, the two-year durational residency requirement easily passes muster and should be upheld.

III. States and local governments' ability to effectively regulate alcohol has broad implications for other substances that also have a special local impact.

Elevating the dormant Commerce Clause over the Twenty-first Amendment in the context of alcohol regulation would affect State and local governments' ability to legislate in other areas of public concern. The Twenty-first Amendment grants broad power to the States to regulate alcohol. If this constitutional grant of power is read narrowly to limit state flexibility to regulate alcohol, then States' flexibility to regulate in other areas that are not subject to specific constitutional grants of power, but nonetheless concern localized, pressing problems, could be severely limited.

For example, States and local governments are currently grappling with the level and nature of regulation necessary to curb opioid and marijuana abuse. In doing so, States and local governments weigh the medical benefits of opioid drugs with the risk of addiction. Likewise, some States recognize medical benefits of marijuana while others do not. In acting in these areas, States and local governments must strike difficult balances, all while respecting (and not discriminating against) other States' approaches to the same issues. *See* National Conference of State Legislatures, *State Medical Marijuana Laws* (Nov. 8, 2018), *available at* http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (summarizing state medical marijuana program laws, including extent to which dispensaries are allowed, out-of-state patients are recognized, and retail sales are allowed); National

Conference of State Legislatures, *Prescribing Policies: States Confront Opioid Overdose Epidemic* (Oct. 31, 2018), *available at* http://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx (describing state prescribing policies, monitoring programs, and other strategies); *see also Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) (recognizing that States have "broad police powers in regulating the administration of drugs by the health professions."). States and local governments should be given deference as they struggle with those local problems.

Of course, the Constitution does not bestow additional power on (or otherwise explicitly reserve regulatory power to) States and local governments to manage these issues, as it does in the context of alcohol. All the more reason the Court's decision here will have a broader impact on State regulation of marijuana and opioids. A decision striking down Tennessee's two-year durational residency regulation where the Twenty-first Amendment provides States extraordinary power to legislate would call into serious question States' ability to deal creatively with other serious, localized issues that are *not* afforded special attention under the Constitution.

CONCLUSION

The Twenty-first Amendment affords States exceedingly wide latitude and discretion to regulate the sale of alcohol within their borders. Amici propose that the Court accordingly adopt a deferential rational basis test for dormant Commerce Clause review of State regulation of alcohol, under which a State regulation will be upheld so long as it bears any rational relationship to a legitimate State interest in controlling the sale and use of alcohol. State regulation of alcohol violates the dormant Commerce Clause only if the regulation could have no purpose other than discrimination against out-of-state economic interests. Under that test, Tennessee's two-year durational residency requirement easily passes muster.

Respectfully submitted,

LISA E. SORONEN
Executive Director
State and Local Legal Center
444 N. Capitol St., N.W.
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

RICHARD A. SIMPSON
Counsel of Record
Tara L. Ward
Emily S. Hart
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
rsimpson@wileyrein.com

No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, AFFLEURE INVESTMENTS, INC., AND TENNESSEE FINE WINES AND SPIRITS, LLC,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF PETITIONER

SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
1440 G Street, NW
Washington, DC 20005

JOHN LAUGHLIN CARTER
Counsel of Record
CARTER HAYES, LLC
4115 Annandale Road
Suite 205
Annandale, VA 20036
(703) 658-7737
jlaughlinc@gmail.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. State Action Constructs and Structures All Markets 4

II. The Twenty-first Amendment Grants States the Authority to Structure Markets for the Production and Distribution of Alcohol 7

III. The Supreme Court Should Restore the States' Full Constitutional Authority Over the Production and Distribution of Alcohol 10

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) ..... *passim*

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000) 12

Craig v. Boren,
429 U.S. 190 (1976) 14

Dickerson v. Bailey,
336 F.3d 388 (5th Cir. 2003) 12

Duckworth v. Arkansas,
314 U.S. 390 (1941) 13

Edwards v. Arthur Andersen LLP,
44 Cal.4th 937 (2008) 6

Eldred v. Ashcroft,
537 U.S. 186 (2003) 5

Goldberg v. Kelly,
397 U.S. 254 (1970) 4

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

Hostetter v. Idlewild Bon Voyage Liquor Corp.,
377 U.S. 324 (1964) 10, 14

Joseph S. Finch & Co. v. McKittrick,
305 U.S. 395 (1939) 9

North Dakota v. United States,
495 U.S. 423 (1990) 13

NV One, LLC v. Potomac Realty Capital, LLC,
84 A.3d 800 (R.I. 2014) 6

Oneok, Inc. v. Learjet, Inc.,
135 S.Ct. 1591 (2015) 7

Osborn ex rel. Osborn v. Kemp,
991 A.2d 1153 (Del. 2010) 5

Shelley v. Kraemer,
334 U.S. 1 (1948) 6

State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936) 3, 9, 12

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 3, 9, 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIII, § 1 5

U.S. Const. amend. XXI ..... *passim*

LEGISLATIVE MATERIALS

76 Cong. Rec. 4143 (1933) 10

OTHER AUTHORITIES

Thomas Babor et al., *Alcohol: No Ordinary Commodity: Research and Public Policy* (2d ed. 2010) 2, 7, 8

Ctr. for Disease Control & Prevention, Fact Sheets - Alcohol Use and Your Health 8

Brannon P. Denning, Smokey and the Bandit *in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 Const. Comment. 297 (2002) 9, 10, 14, 15

Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* (3d ed. 2011) 2, 8

Tim Heffernan, *Last Call*, Wash. Monthly, Nov./Dec. 2012 ..... 3, 15

Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977) 5

Greta R. Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (2012) 4

Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (3d ed. 2001) 4

Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-first Amendment*, 79 Notre Dame L. Rev. 1563 (2004) 10, 11, 14

Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-first Amendment?*, 6 Cardozo Pub. L. Pol'y & Ethics J. 601 (2008) 12, 13

Sidney J. Spaeth, Note, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Calif. L. Rev. 161 (1991) 8

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public. Government—federal, state, and local—constructs and structures markets. All markets therefore reflect the political and moral concerns of the sovereign of the state, which in this case is the people of the United States expressing their wishes through an amendment to the Constitution. The issue here affects the extent to which democratic decision-making at the state level can structure markets for beer, wine, and spirits.

The Open Markets Institute files this brief to make three points. First, markets are a construct of the state. They are not a force of nature. State action creates and structures markets. Among other market enabling and structuring activities, government creates, defines, and protects property rights and enforces contracts and tort, antitrust, and consumer protection law. State

---

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

action is necessary for markets to exist and so unavoidably structures markets.

Second, recognizing that state action creates markets and that alcohol poses significant public dangers, the Twenty-first Amendment grants expansive regulatory authority over alcohol to the states, including the authority to prohibit the production and sale of alcohol entirely. *See* U.S. Const. amend. XXI, § 2. Given that alcohol is "no ordinary commodity," Thomas Babor et al., *Alcohol: No Ordinary Commodity: Research and Public Policy* (2d ed. 2010), "our Constitution has placed commerce in alcoholic beverages in a special category." *Granholm v. Heald*, 544 U.S. 460, 494 (2005) (Stevens, J., dissenting).

Under the plain language of the Twenty-first Amendment, states have the authority to structure commerce in alcohol to advance a range of public aims. Even as the supporters of the Twenty-first Amendment recognized that national prohibition had been a spectacular failure, they continued to appreciate that alcohol warranted special treatment under the law. A major lesson of national prohibition was that the United States was *not* "a single community in which a uniform policy of liquor control could be enforced." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 6 (3d ed. 2011). The framers of the amendment sought to ensure that alcohol would still be subject to close public oversight and gave this power to the states who would structure markets for alcohol in accordance with local preferences.

Third, the Supreme Court should follow the plain meaning of the Twenty-first Amendment and restore the states' full regulatory authority, under the

Constitution, over alcohol production and distribution. In decisions over the past 34 years, the Court has held that states cannot subject out-of-state and in-state alcohol products to differential treatment. *Granholm*, 544 U.S. at 493; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). These decisions are inconsistent with the plain language of the Twenty-first Amendment and "involve not a construction of the amendment, but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). Given the conflict between these precedents and the text of Section 2 of the Twenty-first Amendment, the Court should overrule *Granholm* and *Bacchus* and reestablish the states' full constitutional authority to structure markets in alcohol to advance public ends.

Section 2 "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause" and "exercise full police authority in respect of [these products]." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). Under this authority, states should be free to structure commerce in alcohol to advance a range of public ends, including but not limited to the protection of public health, the promotion of the responsible use of alcohol, and the preservation of decentralized markets with many distributors and producers of alcohol. In the twenty-first century, state structuring of alcohol markets is not anachronistic and instead remains as relevant as ever. *See* Tim Heffernan, *Last Call*, Wash. Monthly, Nov./Dec. 2012, https://washingtonmonthly.com/magazine/novdec-2012/last-call/ (examining the different legal approaches to alcohol distribution in the United States and United Kingdom and describing the

comparatively better economic, political, and social outcomes of the American approach).

ARGUMENT

I. State Action Constructs and Structures All Markets

Markets are a construct of the state. They do not arise from spontaneous ordering or natural forces. State action creates and structures markets. Government creates, defines, and protects property rights and enforces contracts, antitrust, consumer protection, and many other laws and regulations that enable markets. State action is necessary for markets to exist and so unavoidably structures markets. Although sometimes referred to as "free" in nature, all markets rest on a bed of state action. Greta R. Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* 145 (2012). Karl Polanyi expressed this point succinctly, writing "laissez-faire was planned." Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time 147 (3d ed. 2001).

Consider one example of market-enabling state action: property rights. The state creates, defines the scope of, and protects property rights. What constitutes property is a legal, and fundamentally political, question. *See Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."). State actors determine what is, and is not, property.

State action has both narrowed and broadened the scope of property rights over time. *See, e.g.* U.S. Const. amend. XIII, § 1 (abolishing slavery and thereby property rights in human beings); *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (upholding Congress's extension of durational terms for both existing and new copyrights in the Copyright Term Extension Act). For instance, to promote economic development, state courts in the nineteenth century curtailed the property rights of some and expanded the property rights of others. They revised and narrowed the common law doctrines of nuisance and trespass, granting factories, railroads, and other commercial entities the right to engage in activities that inflicted harms on nearby landowners without incurring legal liability. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* 70-71 (1977).

Importantly, government also interprets and enforces contracts. Because contracts are often drafted in open-ended terms and cannot account for all contingencies, courts often have to interpret contracts. *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("If a contract is ambiguous, we will apply the doctrine of *contra proferentem* against the drafting party and interpret the contract in favor of the non-drafting party.").

Enforcement of contracts includes conscious legal choices to withhold state action from parties to certain contracts and *not* enforce agreements that violate constitutional requirements and other public policy. For instance, the Supreme Court has held that the enforcement of racially restrictive covenants violates the equal protection clause of the Fourteenth

Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948). In holding these restrictive covenants to be unenforceable, the Court recognized that "these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." *Id.* at 19.

The states have also opted *not* to enforce certain contracts. By way of example, legislatures in some states have enacted laws that deny judicial enforcement of employee non-compete clauses and credit contracts with interest rates exceeding the state usury limit. *See e.g.*, *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 950 (2008) (rejecting "narrow-restraint" exception to statutory prohibition on enforcement of employee non-compete clauses); *NV One, LLC v. Potomac Realty Capital, LLC*, 84 A.3d 800, 805 (R.I. 2014) ("Liability for usurious interest rates in Rhode Island is well settled and clear. The maximum allowable interest rate is a statutory construct whereby interest rates in excess of 21 percent per annum are deemed usurious. Section 6–26–2(a). Contracts in violation of § 6–26–2 are usurious and void, and the borrower is entitled to recover any amount paid on the loan.").

These examples of property and contract are not exhaustive and merely illustrate how state action enables market activity. As these cases show, state structuring of markets is unavoidable. Through property, contract, and other forms of law and regulation, governments (federal, state, and local)

decide what can—and cannot—be bought and sold in markets and shape the distribution of power among market participants.

II. The Twenty-first Amendment Grants States the Authority to Structure Markets for the Production and Distribution of Alcohol

In the United States today, entities that wield power to structure markets and market activities include Congress, state legislatures, administrative agencies at both the federal and state levels, federal and state courts, and the public directly, such as through referenda. Some bodies, such as Congress and state legislatures, are more democratic and publicly accountable than others, such as courts and agencies. In a modern economy, all these governmental entities exercise market-structuring authority and indeed often overlapping authority. *See, e.g.*, *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1602-03 (2015) (holding that the Natural Gas Act administered by the Federal Energy Regulatory Commission does not field-preempt respondents' state antitrust claims against natural gas traders). In the markets for producing and selling alcohol, the Twenty-first Amendment grants expansive authority to the states and permits states to go as far as imposing complete prohibition on the manufacture and sale of alcohol within their borders.

In addition to ending national prohibition, the Twenty-first Amendment granted broad regulatory authority over alcohol to the states. U.S. Const. amend. XXI, §§ 1, 2. While the supporters of the amendment recognized that national prohibition had been a spectacular failure, they recognized that alcohol was "no ordinary commodity." Thomas Babor et al., *Alcohol:*

No Ordinary Commodity: Research and Public Policy (2010). It is a "drug with toxic effects and other intrinsic dangers such as intoxication and dependence." *Id.* at 11. *See also* Ctr. for Disease Control & Prevention, *Fact Sheets – Alcohol Use and Your Health*, https://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm ("Excessive alcohol use led to approximately 88,000 deaths and 2.5 million years of potential life lost (YPLL) each year in the United States from 2006 – 2010, shortening the lives of those who died by an average of 30 years.").

A major lesson from national prohibition was that the United States was *not* "a single community in which a uniform policy of liquor control could be enforced." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 6 (3d ed. 2011). National prohibition's defiance of local attitudes toward alcohol in many parts of the country had been a key contributor to the lawlessness that resulted from the experiment. Sidney J. Spaeth, Note, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Calif. L. Rev. 161, 165 (1991). Given this experience, the framers of the amendment sought to ensure that alcohol would still be subject to close public oversight and gave this power to the states to structure markets for alcohol in accordance with local preferences.

The plain language of the Twenty-first Amendment grants broad market structuring authority over alcohol to the state. Section 2 states that "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is

hereby prohibited." U.S. Const. amend. XXI, § 2. Under this authority, states can establish prohibition on alcohol within their borders. Since the greater power to prohibit includes the lesser power to regulate, the text of Section 2 grants states the right to regulate the manufacture and sale of alcohol when they choose to permit it. *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 63 (1936) (Brandeis, J.).

In the wake of the enactment of the Twenty-first Amendment, this broad interpretation of Section 2 was uncontroversial. Speaking for the Court more than eighty years ago, Justice Brandeis wrote that requiring states to permit out-of-state liquors to "compete with the domestic on equal terms . . . . would involve not a construction of the [Twenty-first Amendment], but a rewriting of it." *Id.* at 62. The Court held that under the Twenty-first Amendment states could enact rules on the distribution of alcohol that would otherwise violate the dormant Commerce Clause. *Id. See also Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (Brandeis, J.) ("Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) ("The Twnenty-first [sic] Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.").[2] And states "ratified the Twenty-

---

[2] Justice Black who participated in the debates over the Twenty-first Amendment as a member of the Senate stated that the legislative history supported the plain language of Section 2. Brannon P. Denning, Smokey and the Bandit *in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and*

first Amendment with the understanding that it constituted a sweeping grant of states' rights, not a narrowly tailored protection for dry states." Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-first Amendment*, 79 Notre Dame L. Rev. 1563, 1580 (2004).

III. The Supreme Court Should Restore the States' Full Constitutional Authority Over the Production and Distribution of Alcohol

The Supreme Court should follow the plain meaning of the Twenty-first Amendment and restore the states' constitutional authority over alcohol production and distribution. Notwithstanding the text of the Twenty-first Amendment, the Court has restricted this grant of authority and qualified Section 2 on dormant Commerce Clause grounds. Given the tension between its precedents and the text of Section 2, the Court should reestablish the states' expansive constitutional

---

State Regulation of Internet Alcohol Sales, 19 Const. Comment. 297, 307 (2002). In dissent, he wrote that "[t]he legislative history, . . ., should be enough to prove that when the Senators agreed to Section 2 they thought they were returning 'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 338 (1964) (Black, J., dissenting). To illustrate Justice Black's point, the floor manager of the amendment in the Senate stated that "Section 2 'restore[d] to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States.'" 76 Cong. Rec. 4143 (1933) (statement of Sen. Blaine).

authority to structure markets in alcohol for public ends.

In holding that states cannot subject out-of-state and in-state alcohol products to differential treatment, *Granholm v. Heald*, 544 U.S. 460, 493 (2005); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), the Court has contradicted the plain language of the Twenty-first Amendment.[3] Justice Thomas noted this conflict in his meticulous dissent in *Granholm*. Comparing the text of the Twenty-first Amendment to that of the earlier enacted Webb-Kenyon Act, Justice Thomas wrote that the Twenty-first Amendment's "broader language even more naturally encompasses discriminatory state laws . . . . suggest[ing], for example, that a State may ban imports entirely while leaving in-state liquor unregulated[.]" *Granholm*, 544 U.S. at 514 (Thomas, J., dissenting). In critiquing the majority's "totally novel approach to the Twenty-first Amendment" in *Bacchus*, 468 U.S. at 286-87 (Stevens, J., dissenting), Justice Stevens articulated this same understanding of the Twenty-first Amendment. *See id.* at 286 ("If the State has the constitutional power to create a total local monopoly—thereby imposing the most severe form of discrimination on competing product originating elsewhere—I believe it may also engage in a less extreme form of discrimination that merely provides a special benefit, . . . , for locally produced alcoholic beverages.").

---

[3] Indeed, *Bacchus* and *Granholm* recall the Court's readiness to strike down state alcohol rules in the pre-prohibition era. Prince, *supra*, at 1587.

Bacchus and *Granholm* "involve not a construction of the [Twenty-first Amendment], but a rewriting of it." *Young's Market*, 299 U.S. at 62. The Court has greatly narrowed the amendment's broad grant of regulatory authority to the states on the regulation of alcohol production and distribution, a grant of authority that includes the right to prohibit the production and sale of alcohol entirely. U.S. Const. amend. XXI, § 2. The Court's narrow reading of state authority over alcohol is especially ironic because, as Judge Easterbrook wrote, it "pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

In grafting the dormant Commerce Clause on to the Twenty-first Amendment, the Court has granted judges improper supervisory authority over the state structuring of alcohol markets. *Bacchus* held that differential treatment of in-state and out-of-state alcohol producers survive constitutional scrutiny only when they advance the "clear concerns" of the Twenty-first Amendment.468 U.S. at 276. Citing *Bacchus*, other courts have described this as "the 'core concerns' test." *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003). In defending their laws and regulations against dormant Commerce Clause challenges, states face an uncertain—and indeed shrinking—definition of "core concerns" under the Twenty-first Amendment. Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-first Amendment?*, 6 Cardozo Pub. L. Pol'y & Ethics J. 601, 649 (2008). One thing is certain though: "mere economic protectionism" is not a core concern. *Bacchus*, 468 U.S. at 276.

Given the fluidity of the core concern or a functionally similar requirement,[4] democratic efforts at the state level to govern alcohol markets may run afoul of a constitutionality test formulated by judges. The extent to which courts may override state choices under the Twenty-first Amendment is not clear. For instance, while the Court described the three-tier system as "unquestionably legitimate," *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)), courts could in the future decide that the three-tier system functions as "mere economic protectionism[,]" *Bacchus*, 468 U.S. at 276, for in-state distributors or producers of alcohol. Rotter & Stambaugh, *supra*, at 649. As Justice Jackson wrote, the people of the United States enacted the Twenty-first Amendment to *foreclose* this type of judicial legislating over the production and sale of alcohol. *See Duckworth v. Arkansas*, 314 U.S. 390, 398-99 (1941) (Jackson, J., concurring) ("The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate

---

[4] In *Granholm*, as Justice Thomas noted in dissent, the Court did not use the term "core concerns" and instead applied a conventional dormant commerce clause analysis. 544 U.S. at 524 (Thomas, J., dissenting). That said, "[i]n *Granholm*, the Court appears to have assumed, quite reasonably, that preventing access to alcohol by minors was an acceptable Twenty-first Amendment purpose[.]"). Rotter & Stambaugh, *supra*, at 614.

commerce to curb liquor's 'tendency to get out of legal bounds.'").[5]

The Court should overrule *Bacchus* and *Granholm* and restore the states' full constitutional authority to construct and structure markets for alcohol.[6] In these decisions, the Court has "essentially declared itself better suited to determine the nation's alcohol policy than the states and Congress." Prince, *supra*, at 1610-11. Under the text of the Twenty-first Amendment, states have the authority to prohibit the production, sale, and use of alcohol entirely. When they do permit the production and sale of alcohol, states should have the freedom to structure alcohol markets, without fear

---

[5] "To date, the Twenty-first Amendment is the only amendment to be ratified by specially-convened state conventions." Denning, *supra*, at 308 n.50.

[6] Restoring the states' constitutional authority over alcohol would not immunize their choices in this realm from federal statutes and the Constitution in general. As Justice Thomas observed in his dissent in *Granholm*, Section 2 of the Twenty-first Amendment limits only the application of the *dormant* Commerce Clause to state structuring of alcohol markets. Congress can still regulate alcohol through statutes enacted under its Commerce Clause powers. 544 U.S. at 525 (Thomas, J., dissenting). *See, e.g.*, *Hostetter*, 377 U.S. at 334 (blocking state action against seller of alcohol to international travelers because it interfered with the operation of a law passed by Congress pursuant to its Commerce Clause power). Furthermore, aside from being exempt from the dormant Commerce Clause, state laws and regulations on alcohol would still have to comply with other constitutional requirements. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 192, 210 (1976) (holding that Oklahoma statute that "prohibits the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18" violates the equal protection clause of the Fourteenth Amendment).

of courts' overriding their choices using the dormant Commerce Clause. Nothing in the Twenty-first Amendment restricts state authority to judicially-defined "core concerns" of the amendment. Denning, *supra*, at 299.

Section 2 "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause" and "exercise full police authority in respect of [these products]." *Ziffrin*, 308 U.S. at 138. Therefore, states should have the authority to structure commerce in alcohol to promote a range of public ends, including but not limited to the protection of public health, the promotion of the responsible use of alcohol, and the maintenance of decentralized markets with many distributors and producers of alcohol. In the twenty-first century, state structuring of alcohol markets is not anachronistic and instead remains as relevant as ever. *See* Tim Heffernan, *Last Call*, Wash. Monthly, Nov./Dec. 2012, https://washingtonmonthly.com/magazine/novdec-2012/last-call (examining the different legal approaches to alcohol distribution in the United States and United Kingdom and describing the comparatively better economic, political, and social outcomes of the American approach).

CONCLUSION

The Court should overrule its decisions in *Bacchus* and *Granholm* and restore the states' full constitutional authority to regulate the production and distribution of alcohol.

Respectfully submitted,

John Laughlin Carter
Counsel of Record
Carter Hayes, LLC
4115 Annandale Road
Suite 205
Annandale, VA 20036
(703) 658-7737
jlaughlinc@gmail.com

Sandeep Vaheesan
Open Markets Institute
1440 G Street, NW
Washington, DC 20005

November 20, 2018

Counsel for Amicus Curiae

No. 18-96

In the
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, INTERIM DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

DEBORAH J. LA FETRA
Counsel of Record
TIMOTHY R. SNOWBALL
DAVID J. DEERSON
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Phone: (916) 419-7111
Email: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENT CONFLICTS WITH THE PURPOSE AND RATIONALE OF THE COMMERCE CLAUSE 4

A. The Framers Included the Commerce Clause in the Constitution Specifically To Prevent States from Enacting Protectionist Policies 4

B. Alternative Anti-Discriminatory Constitutional Provisions Support the Framers' Design for Interstate Parity 8

1. Privileges and Immunities Clause of Article IV 9

2. Equal Protection Clause of the Fourteenth Amendment 11

3. Fourteenth Amendment Privileges or Immunities Clause 12

C. The Twenty-first Amendment Snould Not Be Read To Allow Discrimination Against Out-of-State Interests 14

II. TENNESSEE OFFERS NO LEGITIMATE JUSTIFICATION FOR ITS DURATIONAL RESIDENCY REQUIREMENT 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

PAGE

Associated Indus. of Missouri v. Lohman,
511 U.S. 641 (1994) 2

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) ..... *passim*

Baldwin v. Fish and Game Comm'n of Mont.,
436 U.S. 371 (1978) 9

Baldwin v. G. A. F. Seelig, Inc.,
294 U.S. 511 (1935) 2

Byrd v. Tenn. Wine and Spirits Retailers Ass'n,
883 F.3d 608 (6th Cir. 2018) 3

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 3

Corfield v. Coryell,
6 F. Cas. 546 (Circuit Court, E.D. Pa. 1823) 9

DaimlerChrysler v. Cuno,
547 U.S. 332 (2006) 1

Dunn v. Blumstein,
405 U.S. 330 (1972) 8

General Motors Corp. v. Tracy,
519 U.S. 278 (1997) 2

Gonzales v. Raich,
545 U.S. 1 (2005) 1

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

H. P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949) 2

Healy v. Beer Institute, Inc.,
491 U.S. 324 (1989) 16

PAGE

Hicklin v. Orbeck,
437 U.S. 518 (1978) 10

Hostetter v. Idlewild Bon Voyage Liquor Corp.,
377 U.S. 324 (1964) 14

Lebamoff Enterprises Inc. v. Rauner,
No. 17-2495, 2018 WL 6191351
(7th Cir. Nov. 28, 2018) 16, 18

McLeod v. J. E. Dilworth Co.,
322 U.S. 327 (1944) 2

Memorial Hospital v. Maricopa County,
415 U.S. 250 (1974) 13

Metropolitan Life Insurance Co. v. Ward,
470 U.S. 869 (1985) 12, 14

Paul v. Virginia,
75 U.S. 168 (1868) 10

People for Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service,
852 F.3d 990 (10th Cir. 2017),
cert. denied, 138 S. Ct. 649 (2018) 1

Pharmaceutical Research and Mfrs. of America v. Concannon, 538 U.S. 644 (2003) 1

Saenz v. Roe,
526 U.S. 489 (1999) 8, 13–14

Shapiro v. Thompson,
394 U.S. 618 (1969) 13

Sissel v. U.S. Dept. of Health and Human Services,
760 F.3d 1 (D.C. Cir. 2014), *cert. denied*,
136 S. Ct. 925 (2016) 1

Slaughter-House Cases,
83 U.S. 36 (1873) 12–13

PAGE

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 8, 10

United States v. Lopez, 514 U.S. 549 (1995) 1

United States. v. Morrison, 529 U.S. 598 (2000) 1

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 10–11

United Bldg. and Const. Trades Council of Camden Cty. v. Mayor and Council of City of Camden, 465 U.S. 208 (1984) 8, 11

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007) 14

Ward v. Maryland, 79 U.S. 418 (1870) 9

Welton v. Missouri, 91 U.S. 275 (1876) 6

Western and Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648 (1981) 12

White v. Massachusetts Council of Const. Employers, Inc., 460 U.S. 204 (1983) 10–11

Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) 8

CONSTITUTION

Articles of Confederation of 1781, art. IX 4

U.S. Const. art. I, § 8, cl. 3 2

STATUTES

PAGE

Tenn. Code. Ann. § 57-3-204(b)(2)(A) (2018) 3

§ 57-3-217 17

§ 57-3-224 17

§ 57-3-225 17

§ 57-3-406(k) 17

OTHER AUTHORITIES

76 Cong. Rec. (1933) 15

Address of the Annapolis Convention (Sept. 14, 1786), *The Papers of Alexander Hamilton*, (Harold C. Syrett, ed., New York, 1961) 5

Alcohol and Tobacco Tax and Trade Bureau, U.S. Dep't of the Treasury, *Federal Alcohol Administration Act*, https://www.ttb.gov/trade_practices/federal_admin_act.shtml (last visited Dec. 7, 2018) 19

Gifford, Daniel J., *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 Emory L.J. 1227 (1995) 7

Grabow, Colin, et al., *The Jones Act: A Burden America Can No Longer Bear*, Cato Institute Policy Analysis No. 845 (June 28, 2018), https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear. 7

PAGE

Jay, Stewart,
Origins of the Privileges and Immunities of State Citizenship under Article IV,
45 Loy. U. Chi. L.J. 1 (2013) 9

Kaynak, Ovgu, et al.,
Providing Alcohol for Underage Youth: What Messages Should We Be Sending Parents?,
75 J. Stud. Alcohol & Drugs 590 (2014) 18

Klarman, Michael J.,
The Founders Coup: The Making of the U.S. Constitution, (Oxford University Press,
New York, NY) (2016) 4–6

Lawson, Evan T.,
The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages, in Social and Economic Control of Alcohol (Carole L. Jurkiewicz & Murphy J. Painter ed., 2008) 15, 19–20

Letter of James Madison to J.C. Cabell
(Feb. 3, 1829), *The Records of the Federal Convention of 1787*,
(Max Farrand, ed., rev. ed. 1966) 6

Leviticus 24:22 (King James Version) 13

Macey, Jonathan R. & Miller, Geoffrey P.,
The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation, 68 N.Y.U. L. Rev. 13 (1993) 12

PAGE

Miech, Richard A., et al.,
Monitoring the Future: National Survey Results on Drug Use, 1975–2017, Vol. I (Ann Arbor: Institute for Social Research, U. of Michigan (2018), http://monitoringthefuture.org/pubs/monographs/mtf-vol1_2017.pdf..... 18

Nielson, Aaron,
No More Cherry-Picking: The Real History of the 21st Amendment's § 2, 28 Harv. J.L. & Pub. Pol'y 281 (2004)..... 15

Posner, Richard A.,
Economic Analysis of Law (5th ed. 1998)..... 2

Resolution Authorizing a Commission to Examine Trade Regulations (Jan. 21, 1786), *The Papers of James Madison*,(Congressional Series) (Robert R. Rutland and William M.E. Rachal, eds., Chicago 1977) 5

Tenn. Office of the Attorney General,
Opinion No. 12-59 (June 6, 2012)..... 3, 17

Opinion No. 14-83 (Sept. 12, 2014)..... 3

The Federalist No. 80 (George Stade ed. 2006) 9

Whitman, Douglas Glen,
Strange Brew: Alcohol and Government Monopoly (2003) 19

Wildenthal, Bryan H.,
State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV, 41 Stan. L. Rev. 1557 (1989).... 11, 14

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, Pacific Legal Foundation (PLF) is one of the most active nonprofit public interest law firms in the United States dedicated to defending the principles of limited government, federalism, and free enterprise. PLF litigates at all levels of the federal and state judiciaries, and has experience directly representing plaintiffs presenting Commerce Clause claims, *see, e.g.*, *People for Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, 852 F.3d 990 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018); *Sissel v. U.S. Dept. of Health and Human Services*, 760 F.3d 1 (D.C. Cir. 2014), *cert. denied*, 136 S. Ct. 925 (2016); and as *amicus curiae*. *See, e.g.*, *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006); *Gonzales v. Raich*, 545 U.S. 1 (2005); *Pharmaceutical Research and Mfrs. of America v. Concannon*, 538 U.S. 644 (2003); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). PLF's broad expertise litigating Commerce Clause issues, engaging in public policy advocacy for federalism, and adhering to constitutional principles offers the Court an important perspective that will be beneficial in reviewing the merits of this case.

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Furthering this ideal, the Commerce Clause, which provides that "the Congress shall have Power . . . [t]o regulate commerce . . . among the several states . . . ." U.S. Const. art. I, § 8, cl. 3, creates an "area of free trade among the several States." *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 650 (1994) (quoting *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). This Court has long held that the corollary of the Commerce Clause, the "dormant" Commerce Clause, forbids state regulation of interstate commerce. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949). This preserves "a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). Despite the clear benefits of free trade and a national market for goods and services, states are sometimes tempted to enact regulations or taxes that impose costs on other states while the benefits remain in the state. Richard A. Posner, Economic Analysis of Law § 25.3, at 699 (5th ed. 1998).

This is precisely what Tennessee seeks to accomplish here: to protect its established residents who engage in the retail liquor marketplace while discouraging new entrants in the market from out of state. Specifically, Tennessee law forbids the issuance

of a retail liquor license to any individual who has not resided in the state for two years prior to the application for a license. Tenn. Code. Ann. § 57-3-204(b)(2)(A) (2018). The state did not enforce the rule after the state's Attorney General twice opined that the two-year durational residency requirement violates the Commerce Clause. *See* Tenn. Office of the Attorney General, Opinion No. 14-83 (Sept. 12, 2014); Tenn. Office of the Attorney General, Opinion No. 12-59 (June 6, 2012). But the Tennessee Wine and Spirits Retailers Association, a lobbying group representing Tennessee's established liquor retailers, threatened to sue the Tennessee Alcoholic Beverages Commission for failing to enforce the residency requirement. The Commission did not wait for the threatened lawsuit, instead filing its own complaint for a declaratory judgment as to the constitutionality of the law. *Byrd v. Tenn. Wine and Spirits Retailers Ass'n*, 883 F.3d 608, 613 (6th Cir. 2018). The district court and Sixth Circuit both held that the residency requirement violated the Commerce Clause.

In our federal system, only Congress has power to promulgate uniform national standards to govern an industry. As the Founders knew and this Court's dormant Commerce Clause jurisprudence has recognized, allowing one state to impose its laws on commerce nationwide would place commerce at the mercy of local, parochial interests and create an anarchy of conflicting state legal regimes that destroys commercial confidence and creates hostility between the states. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring) (differing state regimes regulating flow of solid waste would result in "the type of balkanization the Clause is primarily intended to

prevent"). Tennessee's durational residency requirement not only conflicts with the original purpose of the Commerce Clause to restrict the ability of states to enact protectionist policies, but other constitutional provisions evidencing the Framers' overall design of inter-state parity. Additionally, the law cannot be justified because it fails to achieve Tennessee's stated goals in ensuring a responsible market for spirits. For these reasons, the decision below should be affirmed.

ARGUMENT

I

TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENT CONFLICTS WITH THE PURPOSE AND RATIONALE OF THE COMMERCE CLAUSE

A. The Framers Included the Commerce Clause in the Constitution Specifically To Prevent States from Enacting Protectionist Policies

By early 1787, the government of the United States under the Articles of Confederation was on the brink of total collapse. *See* Michael J. Klarman, *The Founders Coup: The Making of the U.S. Constitution*, 11–12 (Oxford University Press, New York, NY) (2016). Under the Articles, the confederation congress was expressly denied the power to regulate the commerce of individual states. *See* Articles of Confederation of 1781, art. IX. In the wake of the Revolutionary War, Great Britain and other European nations began an ardent campaign of discrimination against the economy of the newly independent and economically vulnerable American nation. Klarman, *supra*, at 21. Individual states soon

began enacting their own retaliatory measures against British imports and commerce. *Id.* at 22–23. Often contradictory and self-defeating, these restrictive protectionist policies were soon extended to the economic activities of their neighboring states. *See id.* at 23–24. Despite the clear need for national unity, every congressional and state-based effort to amend the Articles to give the confederation congress authority to regulate interstate commerce met regional resistance that doomed all attempts. *See id.* at 34–39.

When the Annapolis Convention, called for the limited purpose "to consider how a uniform system in [the states] commercial regulations may be necessary to their common interest and permanent harmony,"[2] failed to garner support from a sufficient number of states, James Madison and others in attendance took the bold step of calling for a general convention, "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."[3] The resulting Constitutional Convention debated many elements of the general government of the American republic in great detail, including the composition and apportionment of the national legislature, the powers of the executive, and the creation of a federal judicial system. But the delegates understood the clear need to "remedy the omissions

---

[2] Resolution Authorizing a Commission to Examine Trade Regulations (Jan. 21, 1786), *The Papers of James Madison*, 8:471 (Congressional Series) (Robert R. Rutland and William M.E. Rachal, eds., Chicago 1977).

[3] Address of the Annapolis Convention (Sept. 14, 1786), *The Papers of Alexander Hamilton*, 3: 688–89 (Harold C. Syrett, ed., New York, 1961).

that had proved to be glaring deficiencies in the Articles," including the lack of a congressional power to regulate interstate commerce. Klarman, *supra*, at 147–151. Mindful of the continuing trade wars, delegates approved a general legislative power over interstate and international commerce. *Id.* at 151–52. Madison later noted that the Commerce Clause "grew out of the abuse of power by [] states . . . and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the general government."[4]

Tennessee's durational residency requirement for liquor retailers, like the protectionist measures enacted by states during the era of the Articles of Confederation, undermines the common benefits and national marketplace essential for the thriving of a unified republic. While it is undisputed "that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry . . . the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (citing *Welton v. Missouri*, 91 U.S. 275, 280 (1876)). "This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). The historical record demonstrates that preventing individual states from enacting "mere economic

---

[4] Letter of James Madison to J.C. Cabell (Feb. 3, 1829), *The Records of the Federal Convention of 1787*, 3:478 (Max Farrand, ed., rev. ed. 1966).

protectionism," *Bacchus*, 468 U.S. at 271, was the primary reason that the Framers included the Commerce Clause in the Constitution.

The free-trade objectives of the Commerce Clause further the efficient allocation of resources within American society, just as free trade among nations helps to further the efficient allocation of resources in the world. Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 Emory L.J. 1227, 1227–28 (1995). No historical event or progress has occurred since the Convention that would mitigate the need for the commerce power to be vested in the national government, including the passage of the Twenty-First Amendment. Protectionist policies still disrupt the free flow of goods and services, have a damaging effect on economic growth, and prevent the development and maintenance of common markets. *See, e.g.*, Colin Grabow, et al., *The Jones Act: A Burden America Can No Longer Bear*, Cato Institute Policy Analysis No. 845 (June 28, 2018).[5] Individual states like Tennessee still favor protectionist policies that ostensibly give an advantage to its own residents. The durational residency requirement in this case is powerful evidence that the threat of economic protectionism is just as strong now as it was over 200 years ago; and the Commerce Clause's restriction on the power of states just as necessary.

---

[5]https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear.

B. Alternative Anti-Discriminatory Constitutional Provisions Support the Framers' Design for Interstate Parity

The Commerce Clause is one of several constitutional provisions designed to ensure interstate parity, such as the Privileges and Immunities Clause of Article IV, *see, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Equal Protection Clause of the Fourteenth Amendment, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972), and the Privileges or Immunities Clause of the Fourteenth Amendment, *see, e.g., Saenz v. Roe*, 526 U.S. 489 (1999). Still other provisions, such as the Import-Export Clause[6] and the availability of federal courts for diversity actions,[7] also ensure the vital goal of national equality.

While these various constitutional provisions play different roles in the overall federal scheme, they

---

[6] "As one follows the tortuous and anguished endeavors to establish a free trade area within Western Europe, unhampered by interior barriers, against the opposition of inert and narrow conceptions of self-interest by the component nations, admiration for the farsighted statecraft of the Framers of the Constitution is intensified. Guided by the experience of the evils generated by the parochialism of the new states, the wise men at the Philadelphia Convention took measures to make for the expansive United States a free trade area .... They accomplished this by two provisions in the Constitution: the Commerce Clause and the Import-Export Clause." *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 551 (1959) (Frankfurter, J., dissenting).

[7] Alexander Hamilton expressly linked the Privileges and Immunities Clause with "the concern over state parochialism that gave rise to the federal courts' diversity jurisdiction under Article III." *United Bldg. and Const. Trades Council of Camden Cty. v. Mayor and Council of City of Camden*, 465 U.S. 208, 225 (1984).

serve the same overarching purpose: interstate parity. As described below, these clauses serve to reinforce one another and fill in gaps. The Framers enacted these interlocking provisions out of concern "about centralizing control over trade and ending discriminatory taxes." *See* Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV*, 45 Loy. U. Chi. L.J. 1, 17 (2013).

1. Privileges and Immunities Clause of Article IV

The Privileges and Immunities Clause of Article IV is a robust anti-protectionist tool enacted by the Framers along with the Commerce Clause. Both provisions have their origins in Article IV, § 1, of the Articles of Confederation, *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 379 (1978), and their separation "may have been an assurance against an anticipated narrow reading of the Commerce Clause." *Id.* at 379–80 (citing *Ward v. Maryland*, 79 U.S. 418, 429–30 (1870)). Alexander Hamilton considered it to be the very "basis of the Union." *The Federalist No. 80* (George Stade ed. 2006 at 440).

From the earliest interpretations of the Clause, its applicability and hostility to state-based economic protectionism was clear. In *Corfield v. Coryell*, Justice Bushrod Washington explained that the clause protects, among other things, "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . ." 6 F. Cas. 546, 552 (Circuit Court, E.D. Pa. 1823). Later, Justice Stephen Johnson Field wrote that "it was undoubtedly the object of the [Privileges and Immunities Clause of Article IV] to place the citizens of each State upon the same footing

with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1868), *rev'd on other grounds, United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Among other things, Justice Field explained that the provision "insures to [the citizens of each State] in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness." *Id.* He further noted that "no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." *Id.*

This Court relied on the Privileges and Immunities Clause to strike down protectionist state laws in a variety of contexts, such as hiring preferences, *Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978), and bar admission requirements, *Piper*, 470 U.S. at 288. And where the dormant Commerce Clause doctrine is not available to invalidate protectionist state policies, whether because they do not implicate interstate commerce or because they fall within an exception to the dormant Commerce Clause doctrine, this Court has often relied upon the Privileges and Immunities Clause to do the job. *See, e.g, Hicklin*, 437 U.S. at 531–32 ("[T]he mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause . . . renders several Commerce Clause decisions appropriate support" for the Court's holding under the Privileges and Immunities Clause.).

The mutually reinforcing nature of the clauses can be seen in the related cases of *White v. Massachusetts Council of Const. Employers, Inc.*, 460

U.S. 204 (1983), and *United Bldg. and Const. Trades Council of Camden Cty. and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 221–22 (1984). In *White*, the Court considered Boston's requirement that at least half of the workforce for any city-funded construction project be comprised of city residents in a challenge brought under the Commerce Clause. The Court upheld the law on the grounds that Boston was not acting as a sovereign but as a "market participant," and, as such, was not bound by the doctrine established by the dormant Commerce Clause. *Id.* at 214. The next year, however, in *Camden*, the Court held that a nearly identical law was subject to challenge under the Privileges and Immunities Clause of Article IV, which has no "market participant" exception. *See* 465 U.S. at 221–22.

2. Equal Protection Clause of the Fourteenth Amendment

Free-trade plaintiffs may also rely on the Equal Protection Clause as justification for challenging certain protectionist policies. *See* Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 Stan. L. Rev. 1557, 1557–58 (1989). For example, in 1944, the Court overturned a longstanding rule that insurance does not constitute "commerce," under the Commerce Clause, thereby imperiling the then-existing regime in which states freely imposed taxes and regulations favoring in-state insurance companies. *See South-Eastern Underwriters*, 322 U.S. at 552–53. In response, Congress passed the McCarran-Ferguson Act of 1945, explicitly approving state-level discriminatory laws

regarding insurance. Jonathan R. Macey and Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. Rev. 13, 25 (1993). Because Congress explicitly authorized these policies, there was no legitimate claim that the law violated the dormant Commerce Clause. Yet in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 883 (1985), this Court turned to the Equal Protection Clause to accomplish what the Commerce Clause could not and struck down an Alabama law that taxed out-of-state insurance companies at a higher rate than their domestic counterparts. The Court found that Alabama's aim in passing the law, "to promote domestic industry," represented "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878.[8]

3. Fourteenth Amendment Privileges or Immunities Clause

Finally, the Privileges or Immunities Clause of the Fourteenth Amendment represents—at least theoretically—yet another avenue for striking down discriminatory state policy which evidences the overall design for interstate parity. Although tightly cabined by early analysis, *see Slaughter-House Cases*, 83 U.S. 36 (1873), this clause has nevertheless proven capable of ensuring that states do not burden the fundamental right to travel. As this Court explained

---

[8] *See also Western and Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 667–68 (1981) (states may not impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination . . . bears a rational relation to a legitimate state purpose").

in *Saenz v. Roe*, 526 U.S. at 502, the Privileges or Immunities Clause of the Fourteenth Amendment protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."

This right to travel protected by the Privileges or Immunities Clause is "firmly embedded in [Supreme Court] jurisprudence." *Id.* at 498. It is "a virtually unconditional personal right, guaranteed by the Constitution to us all." *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)). Even the *Slaughter-House Cases*, commonly understood to have gutted the Privileges or Immunities Clause, recognized that the Clause protected the right to travel. The Court explained that the Clause guarantees that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83. U.S. at 80. Indeed, recognition of this right of interstate parity can be traced back long before *Slaughter-House*: this Court has compared the constitutional guarantee that new residents have "the same right to vital government benefits and privileges" as other citizens with the Biblical command that "Ye shall have one manner of law, as well for the stranger, as for one of your own country," *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974) (quoting Leviticus 24:22 (King James Version)).

C. The Twenty-first Amendment Should Not Be Read To Allow Discrimination Against Out-of-State Interests

Constitutional history and the application of anti-protectionist provisions demonstrate that interstate parity is essential to the foundation of our constitutional framework. This Court has made ample use of the Commerce Clause and other provisions to safeguard this vision of the Framers. Whether classed as a protection against economic protection, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 343 (2007), the right to equal protection of the laws, *Metropolitan Life*, 470 U.S. at 869, or the right to travel freely, *Saenz*, 526 U.S. at 489, this Court's decisions reveal a strong antipathy to state protectionism and a norm of invalidation for such policies. *See* Wildenthal, *supra*, at 1557–58.

The Twenty-first Amendment does not eliminate these protections because "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other . . . ." *Bacchus*, 468 U.S. at 275 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)). So too, each provision must be read in light of the Constitution as a whole. Considering the dexterous and many-sided architecture of interstate parity in the Constitution, the limitations of the Twenty-first Amendment's second section are thrown into relief. The most obvious purpose of § 2 was to allow dry states to remain dry. Senator Blaine of Wisconsin, who sponsored the Twenty-first Amendment, explained that the aim of § 2 was "to assure the so-called dry

States against the importation of intoxicating liquor into those States . . . ." 76 Cong. Rec. 4141 (1933).[9] This sentiment was echoed by others. *See* 76 Cong. Rec. 4168, 4170 (1933) (statements of Senator Simeon D. Fess of Ohio and Senator William Borah of Idaho).

Of course, states possess regulatory powers concerning alcohol that fall short of outright prohibition. But while the Twenty-first Amendment permits states to "combat the perceived evils of an unrestricted traffic in liquor" notwithstanding any *incidental* burdens on interstate commerce, it does not allow states to pass *discriminatory* regulations designed to protect local economic interests. *See Bacchus*, 468 U.S. at 276. There is little doubt that the policy aims of states today differ markedly from those that the Twenty-first Amendment was intended to protect: no more dry states remain; states employ their regulatory authority only for protectionist ends.

Before Prohibition, states wanted to keep alcohol out of their citizens' hands, but the Commerce Clause required them to allow alcoholic beverages to enter unregulated. *See Granholm*, 544 U.S. at 477–78; *see also* Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, in Social and Economic Control of Alcohol 44 (Carole L. Jurkiewicz & Murphy J. Painter ed., 2008). Today, states like Tennessee want to allow the sale of alcoholic beverages, but seek to afford in-state actors

---

[9] Another comment by Senator Blaine has been read to contradict this one. *See Bacchus*, 468 U.S. at 274–75. Looking to the congressional record as a whole, however, suggests that the narrower view is the better one. *See* Aaron Nielson, *No More Cherry-Picking: The Real History of the 21st Amendment's § 2*, 28 Harv. J.L. & Pub. Pol'y 281, 287–88 (2004).

an advantage in the marketplace. *See id.* As such, Tennessee's durational residency requirement "deprive[s] citizens of their right to have access to the markets of other States on equal terms," and "risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid." *Granholm*, 544 U.S. at 473.

II

TENNESSEE OFFERS NO LEGITIMATE JUSTIFICATION FOR ITS DURATIONAL RESIDENCY REQUIREMENT

Tennessee's durational residency requirement for liquor retail licenses fails to achieve Tennessee's stated goals in ensuring a responsible market for spirits. Even in Twenty-first Amendment cases, states must present evidence that discriminatory laws are "justified by a valid factor unrelated to economic protectionism." *Lebamoff Enterprises Inc. v. Rauner*, No. 17-2495, 2018 WL 6191351, at *3 (7th Cir. Nov. 28, 2018) (quoting *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 340–41 (1989)). State laws constituting "mere economic protectionism" are not entitled to Twenty-first Amendment deference. *Bacchus*, 468 U.S. at 276. A careful examination of Tennessee's liquor distribution regime reveals that the justifications it offers for its discriminatory policies do not stand up to scrutiny.

Tennessee argues that its durational residency requirement is justified because retailers are "closest to the local risks that come with selling alcohol, such as drunk driving, domestic abuse, [and] underage drinking, and requiring a two-year residency period

ensures that they will be knowledgeable about the community's needs and committed to its welfare."[10] Pet. Br. at 16. But Tennessee allows out-of-state manufacturers to ship their products into the state without protest. Tenn. Code Ann. § 57-3-217 (2018). It also allows third-party delivery services to purchase alcoholic beverages from retailers and deliver it straight to consumers' doors. *Id.* § 57-3-406(k). There is no residency requirement for the delivery service itself or for its drivers. *See id.* §§ 57-3-224, 57-3-225.

Tennessee is not required to allow these activities. Even after *Granholm*, a state may prohibit direct shipment from out-of-state producers as long as it similarly prohibits shipment from their in-state equivalents. *See Granholm*, 544 U.S. at 493. And yet, despite the alleged importance of retailers being both knowledgeable about the community's needs and committed to its welfare, apparently Tennessee does not perceive similar needs arising from out-of-state manufacturers or delivery drivers recently arrived in the state. The correlation between duration of residency in Tennessee and knowledgeability and commitment to local communities is tenuous at best. Given basic geography, a would-be retailer residing in West Memphis, Arkansas—just across the border—is surely better situated to understand and be committed to the needs and welfare of adjacent Memphis, Tennessee, than a retailer doing business

---

[10] It is worth noting that while Tennessee introduced the durational residency requirement in 1939, Pet. Br. at 11, but did not pronounce these rationales until 2013, Tenn. Pub. Acts, Ch. No. 554, 108th General Assembly, a year after Tennessee's Attorney General first opined that the residency requirements were unconstitutional. *See* Tenn. Office of the Attorney General, Opinion No. 12-59 (June 6, 2012).

in Johnson City, nearly 500 miles northeast of Memphis. *Cf. Lebamoff Enterprises*, at *6.

Furthermore, it is not clear *how* the requirement is meant to serve the purposes asserted. For example, Tennessee argues the requirement combats underage drinking. But the vast majority of underage drinkers do not purchase alcohol at retail stores, which are required by law to check identification, and instead obtain alcohol from friends or family members above the legal drinking age. Ovgu Kaynak, et al., *Providing Alcohol for Underage Youth: What Messages Should We Be Sending Parents?*, 75 J. Stud. Alcohol & Drugs 590, 590 (2014). Additionally, underage drinking has been on the decline across the nation, with 40% fewer 8th, 10th, and 12th graders reporting alcohol use in 2017 than 20 years prior. Richard A. Miech, et al., *Monitoring the Future: National Survey Results on Drug Use, 1975–2017, Vol. I* at Table D-2 (Ann Arbor: Institute for Social Research, U. of Michigan (2018).[11] Tennessee has offered no evidence that it differs from this national trend. A similar justification was proffered by the state in *Granholm*. But this Court noted that the states provided "little evidence" that protectionist policies would have a significant effect on underage drinking. *Granholm*, 544 U.S. at 490. Tennessee also fails to shed light on how its durational residency requirement alleviates the problems it identifies, short of "unsupported assertions." *See id.*

Finally, the economic landscape today is drastically different than it was when states developed their liquor distribution systems the 1930s. The goal of these "three-tier" systems, whereby

---

[11] http://monitoringthefuture.org/pubs/monographs/mtf-vol1_2017.pdf

producers, wholesalers, and retailers are stratified and tightly regulated, was to fragment and weaken economic actors to prevent collusion and corruption typical of the pre-Prohibition era. Lawson, *supra*, at 50; *see also* Douglas Glen Whitman, *Strange Brew: Alcohol and Government Monopoly* 3 (2003). Before Prohibition, producers frequently provided incentives for retailers to carry their brands on an exclusive basis, and sometimes even owned the saloons outright. Whitman, *supra*, at 3. These collusive arrangements resulted in so called "tied houses," and were believed to encourage the consumption of alcohol. *Id.*

But economic, technological, and social changes have undermined this aim by prompting consolidation at each level in the industry. Lawson, *supra*, at 50. Today, suppliers are largely multinational corporations producing big-name brands that wholesalers and retailers alike must carry to be competitive. *Id.* Whitman, *supra*, at 3. In any case, the Federal Alcohol Administration Act was created to address the type of problematic practices typical of the tied houses. *Id.* at 4; *see* Alcohol and Tobacco Tax and Trade Bureau, U.S. Dep't of the Treasury, *Federal Alcohol Administration Act.*[12] Thus, three-tiered systems have proven ineffective at preventing the relationships thought to engender harmful practices that promote alcohol consumption. Meanwhile, federal regulation directly prohibits collusion and corruption, rendering the state analogs superfluous. No justification is left. The "concept of promoting

---

[12] https://www.ttb.gov/trade_practices/federal_admin_act.shtml (last visited Dec. 7, 2018).

temperance by limiting local sale of alcoholic beverages to local businesses that are sensitive to the needs of their community and impervious to pressure to increase sales because of the separation of the tiers, if it was ever viable, no longer applies." Lawson, *supra*, at 50. The inescapable conclusion is that Tennessee enacted its durational residency requirement for the purposes of protectionism; a purpose repugnant to the Constitution.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

DATED: December, 2018.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
TIMOTHY R. SNOWBALL
DAVID J. DEERSON
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Phone: (916) 419-7111
Email: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF RESPONDENTS

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

Zayn Siddique
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Kelsi Brown Corkran
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8497
kcorkran@orrick.com

Randy J. Kozel
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The *Granholm* Framework Determines The Validity Of Alcohol Regulations Under The Commerce Clause. 5

Step 1: Is there discrimination? 7

Step 2: Is the law authorized by the Twenty-first Amendment? 9

Step 3: Does the law advance a legitimate goal that cannot be served by nondiscriminatory alternatives? 13

II. Tennessee's Durational Residency Requirement Fails Under The *Granholm* Analysis 14

A. Discrimination 14

B. Immunity 16

C. Nondiscriminatory Alternatives 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....5, 19

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984).....5, 7, 8, 9, 11, 12, 16, 17

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,
476 U.S. 573 (1986).....6, 8, 10, 11

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978).....7, 9

Cooper v. Tex. Alcoholic Beverage Comm'n,
820 F.3d 730 (5th Cir. 2016).....12

Craig v. Boren,
429 U.S. 190 (1976).....5, 19

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008).....6

Granholm v. Heald,
544 U.S. 460 (2005).....*passim*

Halliburton Oil Well Cementing Co. v. Reily,
373 U.S. 64 (1963).....8

Healy v. Beer Inst.,
491 U.S. 324 (1989).....5, 8, 10

Lewis v. BT Inv. Managers, Inc.,
447 U.S. 27 (1980).....20

New Energy Co. of Indiana v. Limbach,
486 U.S. 269 (1988).....6, 13

North Dakota v. United States,
495 U.S. 423 (1990).....5, 6

Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.,
511 U.S. 93 (1994).....2, 7

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018).....4

Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n,
313 F. Supp. 3d 751 (W.D. Tex. 2018).....23, 24

Constitutional Authorities

U.S. Const. amend. XXI .....*passim*

U.S. Const. art. 1, § 8, cl.3 .....*passim*

Statutes

Ariz. Rev. Stat. Ann. § 4-243(A) 18

Ark. Code Ann. § 3-2-103.....21

ch. 235 Ill. Comp. Stat. Ann. § 5/6-1.5.....18

ch. 235 Ill. Comp. Ill. Stat. § 5/6-4(a) 18

1989 Minn. Sess. Law Serv. 49.....24

Minn. Stat. Ann. § 340A.402 23

Minn. Stat. Ann. § 340A.412 .....21, 24

Minn. Stat. Ann. § 340A.414 24

Mont. Code Ann. § 16-4-1005 22

N.D. Cent. Code Ann. § 5-02-11.....23

N.J. Stat. Ann. § 33:1-25.....24

N.J. Stat. Ann. § 33:1-35.....24

N.Y. Alco. Bev. Cont. Law § 101(1) 18

N.Y. Alco. Bev. Cont. Law App. § 81.1 24

Neb. Rev. Stat. Ann. § 53-1,104.....23

Neb. Rev. Stat. Ann. § 53-169(1) 18

Neb. Rev. Stat. Ann. § 53-171.....18

Or. Rev. Stat. Ann. § 471.341 22

Tenn. Code Ann. § 57-3-204.....15, 20

Tenn. Code Ann. § 57-3-803.....21

Tenn. Code Ann. § 57-4-101.....18, 21

Tenn. Code Ann. § 57-4-102.....18, 21

Tenn. Code Ann. § 57-4-201.....18, 21

Tenn. Code Ann. § 57-5-103.....21

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is a public policy organization whose members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, furnish goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the practical consequences of pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 100 cases.

The RLC and its members have a significant interest in this case. Some RLC members sell liquor. As interstate retailers, they would be barred by Tennessee's durational residency law, and by others like it, if it were enforceable. More generally, RLC members have an interest in ensuring that the Commerce Clause continues to serve its crucial role as a bulwark against protectionism in all industries.

---

[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tennessee's durational residency law keeps interstate retailers out of the alcohol trade based simply on where their owners, officers, directors, and stockholders live. The legislature could achieve every one of its purported public policy objectives in a host of nondiscriminatory ways. The real beneficiaries are the local retailers the law protects from competition.

Petitioner's response is not so much to dispute these points as to argue that they don't matter. On Petitioner's logic, the very act of asking whether protectionism is afoot goes too far: "A bar on protectionist laws would amount to reasonableness review," and such review "is irreconcilable" with the Twenty-first Amendment. Pet. Br. 43-44.

Petitioner is wrong. This Court has made clear that economic protectionism violates an overarching principle of constitutional law embodied in the Commerce Clause. Nondiscrimination is more than a fragile aspiration that gives way any time someone pours a drink. *See Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("[S]tate laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)). Hence this Court's repeated rejection of claims that the Twenty-first Amendment renders concerns about protectionism irrelevant. *See id.* at 486-87 (holding that "the Twenty-first Amendment does

not supersede other provisions of the Constitution" and collecting cases).

In filing this *amicus* brief, the RLC seeks first and foremost to make a basic point: Petitioner's proposed approach to assessing the constitutionality of alcohol regulations is not simply novel, but would upend the framework the Court established in *Granholm*. That three-step test asks first whether the regulation discriminates; if so, whether that discrimination is protected by the Twenty-first Amendment; and finally, whether the state could have pursued its goals in nondiscriminatory ways. *See id.* at 472, 476, 489. The Court carefully tailored this framework to reflect the Commerce Clause's commitment to interstate competition free from discrimination as well as the Twenty-first Amendment's grant of regulatory authority to the states.

The laws at issue in *Granholm* were discriminatory under familiar Commerce Clause principles. They were not saved by the Twenty-first Amendment, and they pursued goals that could be advanced without discriminating against out-of-state interests. The same is true of Tennessee's durational residency law, as the Sixth Circuit properly concluded. *See* Pet. App. 33a.

Rather than taking *Granholm*'s framework on its own terms—which is fatal to Tennessee's residency law—Petitioner posits that the Commerce Clause simply has no application to retailers. *See* Pet. Br. 43-44. There is no warrant for Petitioner's cramped view. Like the cases that preceded it, *Granholm* harmonized the Commerce Clause with the Twenty-first

Amendment as a general matter, yielding an analysis that applies to discrimination against interstate *commerce*, not just interstate *products*. As this Court recognized last Term, *Granholm* reflects the importance of nondiscrimination as an enduring constitutional principle. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (citing *Granholm* as supporting the "virtually *per se*" rule for invalidating discriminatory laws).

The RLC's second reason for submitting this brief is to underscore an obvious reality, notwithstanding Petitioner's suggestions to the contrary: State residency has nothing to do with whether a retailer is a law-abiding member of, and valued contributor to, a local community. Interstate retailers can and do work hard to comply with drinking age laws. They can and do keep careful records for calculating and submitting taxes. They can and do invest in communities and hire local employees to staff their stores. Yet in Tennessee, none of that matters if their owners, officers, directors, and stockholders have not lived inside the state's borders for a long enough time. This protection of in-state sellers from interstate competition is not subtle; it is evident on the face of Tennessee's statute. Such discrimination is a paradigmatic violation of the Commerce Clause and in no way immunized by the Twenty-first Amendment. The latter authorizes states to regulate alcohol sales, not to prop up local interests by keeping competitors at bay.

ARGUMENT

I. The *Granholm* Framework Determines The Validity Of Alcohol Regulations Under The Commerce Clause.

This Court has evaluated the constitutionality of alcohol regulations on numerous occasions and in a range of contexts. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (challenge under the First Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (challenge under the Equal Protection Clause). Included among those cases are several controversies over the consistency of alcohol-related laws with the Commerce Clause. *See, e.g., North Dakota v. United States*, 495 U.S. 423 (1990); *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The Court's most recent discussion of that intersection is also its most extensive: *Granholm*, 544 U.S. 460.

Granholm dealt with laws in Michigan and New York that allowed in-state wineries to sell directly to consumers while making it illegal or impractical for out-of-state wineries to do so. The Court considered the same issue that animates this case: the relationship between the nondiscrimination principle of the Commerce Clause and state regulatory authority under the Twenty-first Amendment. It concluded that both interests could be served. Discriminatory laws violate the Commerce Clause even in the field of alcohol regulation. *See Granholm*, 544 U.S. at 489. At the same time, states possess extensive discretion to regulate the alcohol trade in nondiscriminatory ways, including by establishing a tiered system that divides

the operations of producers, wholesalers, and retailers. *See id.* As the Court has previously observed, the three-tier system allows states to pursue goals such as "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432.

Drawing on the body of Commerce Clause jurisprudence as well as the history of the Twenty-first Amendment, *Granholm* took a three-step approach to evaluating the laws at issue. The first question is whether a law discriminates against interstate commerce. *See* 544 U.S. at 472. If there is discrimination, the Court moves on to consider whether the law is saved by the Twenty-first Amendment. *See id.* at 476.[2] Finally, if the Twenty-first Amendment does not save the law, the Court asks whether the law nevertheless "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)).

Granholm's three-step analysis applies in full measure to cases like this one. The Court set forth a

---

[2] *Granholm* did not have occasion to discuss the implications of finding that no discrimination is present, though this Court has indicated that "[w]hen ... a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds local ... benefits." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008).

framework that safeguards interstate competition and forecloses economic protectionism while preserving states' discretion to regulate alcohol. Petitioner's response is to advance a revisionist account of *Granholm* based on snippets that mention out-of-state products, even as it ignores the framework the Court deliberately applied. In the sections that follow, we describe the full scope of this Court's controlling constitutional analysis.

Step 1: Is there discrimination?

Granholm begins by asking whether the laws at issue discriminated against out-of-state interests. *See* 544 U.S. at 472 ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Oregon Waste*, 511 U.S. at 99)). This is the threshold step—with respect to alcohol as well as other goods and services—because discriminatory laws "face 'a virtually *per se* rule of invalidity.'" *Id.* at 476 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *see also Bacchus*, 468 U.S. at 268, 274-76. The path of the constitutional analysis depends in the first instance on whether discrimination is afoot.

The laws in *Granholm* were plainly discriminatory. In Michigan, only wineries within the state could ship directly to consumers. *See* 544 U.S. at 473-74. As for New York, in-state producers could ship directly to consumers, while out-of-state producers needed to open "a branch office and warehouse" within the

state. *Id.* at 474-75. That approach contravened the Court's "admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)).

While *Granholm* took discrimination as its starting point, Petitioner would have this Court ignore discrimination altogether. On Petitioner's telling, the "Twenty-first Amendment makes the dormant Commerce Clause inapplicable to most state laws regulating liquor distribution." Pet. Br. 24. Petitioner's claim is nothing more than old wine in new bottles. *Granholm* rejected it, instead broadly embracing the well-established premise that laws cannot "deprive citizens of their right to have access to the markets of other States on equal terms." 544 U.S. at 473. The Court affirmed that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, with cites to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, *Brown-Forman Distillers Corp.*, 476 U.S. 573, and *Healy*, 491 U.S. 324. It punctuated the point by quoting *Brown-Forman* for the proposition that "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." 544 U.S. at 487 (quoting *Brown–Forman*, 476 U.S. at 579).

The discrimination inquiry comes first, because it shapes the ensuing analysis of whether a law is authorized by the Twenty-first Amendment. From the standpoint of the Commerce Clause, protectionism is

no less of a concern in the alcohol industry than it is in other domains.

Step 2: Is the law authorized by the Twenty-first Amendment?

After concluding that the laws at issue discriminated against out-of-state interests—and thus triggered the "virtually *per se* rule of invalidity"— the *Granholm* Court proceeded to consider whether they were immunized by the Twenty-first Amendment. 544 U.S. at 476 (quoting *City of Philadelphia*, 437 U.S. at 624).

In conducting that analysis, the Court began with history. It explained that the Twenty-first Amendment "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts." *Id.* at 484. Those Acts expanded state regulatory authority over the alcohol industry, but they did not endorse or authorize protectionism. *See id.* at 483-84.

The Court also looked to its precedents, which emphasize the importance of vigilance against protectionism even in the alcohol trade. In *Bacchus*, the Court invalidated a tax that exempted certain locally produced beverages in Hawaii. In doing so, it rejected any suggestion that the Twenty-first Amendment served to "empower States to favor local liquor industries by erecting barriers to competition." 468 U.S. at 276. Likewise, the Court in *Brown-Forman* held that a New York law violated the Commerce Clause by effectively preventing distillers from running certain promotions outside of New York. This was itself a form of protectionism, for "[w]hile a State may seek

lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." 476 U.S. at 580; *see also id.* ("Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.").

A few years after *Brown-Forman*, *Healy v. Beer Institute* struck down a Connecticut statute that required out-of-state beer shippers to affirm that their prices in Connecticut were no higher than their prices in neighboring states. *See* 491 U.S. at 326. The Court reasoned that while Connecticut has significant regulatory discretion over alcohol distribution, it may not "penaliz[e] Connecticut brewers if they seek border-state markets and out-of-state shippers if they choose to sell both in Connecticut and in a border State." *Id.* at 341. Punishing those who do business in other states is antithetical to the Commerce Clause, whatever the industry.

Based on its historical and doctrinal analysis, the Court in *Granholm* concluded that the discriminatory laws before it were not saved by the Twenty-first Amendment. That Amendment allows a state "which chooses to ban the sale and consumption of alcohol altogether" to "bar its importation." 544 U.S. at 488-89. It also allows states to "assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system." *Id.* at 489. Even so, it is "well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause." *Brown-Forman*,

476 U.S. at 584. The laws in Michigan and New York went too far by discriminating against out-of-state competitors.

Granholm is not alone in highlighting the salience of protectionism in cases involving alcohol. In *Bacchus*, the Court observed that "[s]tate laws that constitute mere economic protectionism are ... not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." 468 U.S. at 276. The Sixth Circuit recognized this principle in the decision below, noting that the Commerce Clause "prevents 'economic protectionism'—*e.g.*, a state protecting in-state economic interests by burdening out-of-state economic interests." Pet. App. 28a. And Judge Sutton, who parted ways with the majority over some aspects of Tennessee's system, agreed that discriminatory laws are invalid if "they serve no purpose besides 'economic protectionism.'" Pet. App. 49a (quoting *Bacchus*, 468 U.S. at 276). That Petitioner will not accept even this fundamental point is both striking and indicative of the extreme position it has staked out. *See* Pet. Br. 43.

Petitioner thus takes upon itself the unenviable task of defending the power of states to enact protectionist laws. Any other approach, Petitioner maintains, would amount to "reasonableness review" that is inconsistent with the Twenty-first Amendment. Pet. Br. 43-44. This argument not only ignores the Court's long history of applying the nondiscrimination principle in a clear and rigorous fashion, but remarkably portrays economic protectionism as none of the judiciary's concern. *See* Pet. Br. 44 (contending that scrutinizing protectionist laws "would bog down

the courts in policy disputes and leave the states with little certainty as to the validity of their liquor laws"). That depiction, as explained above, is impossible to square with cases like *Granholm* and *Bacchus*.

Petitioner's response is to reimagine those cases. *See* Pet. Br. 43. Because *Granholm* and *Bacchus* involved "products," Petitioner concludes that the Court implicitly endorsed discrimination against out-of-state retailers. *See* Pet. Br. 41-44. But Petitioner has distilled the wrong lesson from this Court's cases. *Granholm* and *Bacchus* found discrimination against out-of-state interests to be unlawful, and they affirmed the significance of nondiscrimination as a constitutional principle. *See Granholm*, 544 U.S. at 472; *Bacchus*, 468 U.S. at 276. Nothing in those decisions supports Petitioner's claim that states have free rein to discriminate so long as they pick the right targets.

Further, *Granholm* expressly rejected an invitation to overrule *Bacchus* or limit the case to its facts. 544 U.S. at 488; *see also Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016) (*Cooper II*) ("State regulations of the producer tier 'are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.' ... But state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." (quoting *Granholm*, 544 U.S. at 489)). In effect, Petitioner asks this Court to do what it has already refused in *Granholm*.

Step 3: Does the law advance a legitimate goal that cannot be served by nondiscriminatory alternatives?

Having determined that the discriminatory Michigan and New York laws were not excused by the Twenty-first Amendment, the *Granholm* Court turned finally to "whether either state regime 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" 544 U.S. at 489 (quoting *New Energy Co. of Ind.*, 486 U.S. at 278).

The main justifications offered by the states were "keeping alcohol out of the hands of minors and facilitating tax collection." *Id.* Neither withstood scrutiny. The argument about use by minors was undermined by the lack of evidence implicating direct shipments of wine. *See id.* at 490. There was also a problem of underinclusiveness: even with the laws in place, minors could order wine directly from in-state producers. *See id.* As for the tax-collection rationale, it had no purchase in Michigan, which already taxed out-of-state wineries for shipments made to in-state wholesalers and could extend that practice to direct shipments. *See id.* at 491. Similarly, New York could require out-of-state direct shippers to apply for a permit and submit sales data, which would facilitate orderly taxation. *See id.*

Ultimately, Michigan and New York fell short of the "exacting standard" they needed to satisfy in order to show that "nondiscriminatory alternatives will prove unworkable." *Id.* at 493.

Again placing itself in opposition to *Granholm*, Petitioner disputes the relevance of this inquiry into nondiscriminatory alternatives. It begrudgingly mentions the presence of nonprotectionist justifications "[t]o the extent it matters." Pet. Br. 47. Of course, as *Granholm* holds, it matters greatly. And as explained below, the absence of any such justifications for Tennessee's law confirms its invalidity.

II. Tennessee's Durational Residency Requirement Fails Under The *Granholm* Analysis.

A straightforward application of the *Granholm* framework demonstrates that Tennessee's durational residency requirement is invalid. Like every state, Tennessee possesses broad authority to regulate the distribution of alcohol, including through its implementation of the three-tier system. It has numerous avenues within that system to ensure that retailers doing business within its borders are complying with all applicable laws. But that is not a license to discriminate against interstate retailers or out-of-state interests, especially when the retail practices described below demonstrate that interstate retailers, operating in nondiscriminatory regulatory environments, are just as able to serve the reasonable objectives of alcohol oversight as their single-state counterparts.

A. Discrimination.

The Michigan laws at issue in *Granholm* allowed in-state wineries to ship directly to consumers while

foreclosing out-of-state wineries from doing the same. Discrimination was easy to discern. *See* 544 U.S. at 473-74. New York did not strictly bar out-of-state wineries from direct shipments; rather, it required them to set up an in-state distribution apparatus that in-state wineries could skip. *See id.* at 474. This, too, was discriminatory. *See id.*

Tennessee's residency requirement comes from the same mold. Under Tennessee law, it is not enough to set up a brick-and-mortar retail outlet within the state. To obtain the requisite liquor license, a would-be retailer must have lived within Tennessee for what the legislature deems to be a sufficient amount of time. Tenn. Code Ann. § 57-3-204(b)(2)(A) (establishing a two-year residency requirement for any individual seeking a retail liquor license). That residency period is even longer for a retailer seeking to renew its license. *Id.* (requiring ten years of residency prior to issuing a renewal). A *corporate* retailer must go still further, ensuring that all its officers, directors, and capital stockholders have lived in Tennessee for the requisite amount of time. *Id.* § 57-3-204(b)(3)(A)-(B), (D) (establishing a two-year residency requirement for any officer, director, or stockholder of a corporation seeking a retail liquor license).[3]

---

[3] Petitioner has not defended the stockholder residency requirement or the extended residency requirement for renewals before this Court. *See* Pet. Cert. Reply 2. Nevertheless, those provisions are notable in illustrating the dramatic and onerous implications of Tennessee's regulatory approach for would-be entrants to its market.

The upshot of Tennessee's law is that if the owners, directors, officers, and stockholders of your organization have lived in Tennessee for a long enough time, you can establish a retail outlet there. If they haven't, you can't. As the Sixth Circuit explained, the law "prevents out-of-state residents from obtaining retail licenses and protects in-state residents who are retailers." Pet. App. 31a. That is the essence of discrimination.[4]

B. Immunity.

The next question is whether Tennessee's discriminatory law is saved by the Twenty-first Amendment. *See Granholm*, 544 U.S. at 476. Petitioner's position is that regulations governing retailers are

---

[4] Aside from its discriminatory effect, there is also evidence that Tennessee's durational residency requirement was enacted with a discriminatory purpose. *Cf. Bacchus*, 468 U.S. at 270 (holding that "either discriminatory purpose ... or discriminatory effect" provide a basis for finding "economic protectionism" (citation omitted)). The Attorney General of Tennessee, for instance, suggested such a conclusion when he opined that the legislative history of a precursor provision "reveals no legitimate public policy ... and indeed provides some evidence that the legislative intent ... was to deter the sale of alcoholic beverages from outside Tennessee." Opp. App. 11a. In reaching that determination, the Attorney General pointed to evidence such as a floor debate in which a Tennessee legislator remarked that the Tennessee House had just voted "to kill interstate banking" and "all [the durational residency requirement] does is kill interstate whiskey." Opp. App. 9a. Given the procedural posture of this case, the Court of Appeals had no occasion to rule on discriminatory purpose. If this Court were inclined to reverse the discriminatory effect finding, however, it should remand to permit the lowers courts to develop the factual record as to discriminatory purpose.

somehow exempt from nondiscrimination principles, such that legislatures have carte blanche. *See* Pet. Br. 43-44. That theory runs headlong into *Granholm*, which set forth a framework for accommodating the Commerce Clause and the Twenty-first Amendment without any suggestion that retailing plays by an entirely different set of rules. *See supra* at 9-12.

The Sixth Circuit followed this Court's lead by considering the relationship between Tennessee's law and the scope of states' regulatory discretion over the alcohol industry. *See* Pet. App. 24a (citing *Bacchus*, 478 U.S. at 275-76). It concluded that the protectionist residency requirement is not immunized by the Twenty-first Amendment. The three-tier system of alcohol regulation might permissibly require that alcohol retailers have a physical presence within the state, the Sixth Circuit observed, but that is no warrant for durational residency requirements based on where owners, directors, officers, and stockholders live. Pet. App. 27a.

The Sixth Circuit's analysis coheres with this Court's recognition in *Bacchus* that "one thing is certain" when it comes to the Twenty-first Amendment: "The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. It is likewise consistent with *Granholm*, which confirmed the validity of the three-tier system but drew the line at efforts to favor in-state interests. *See* 544 U.S. at 489.

The corollary is that invalidating Tennessee's discriminatory residency law would in no way challenge

the legitimacy of the three-tier system of regulation. States like Tennessee can still insist that producers sell to wholesalers, who sell to retailers, who sell to customers. *See Granholm*, 544 U.S. at 489 ("States may ... assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system."). And they can establish separate licensing requirements at each stage. Numerous states maintain such a system without any residency requirements. *See, e.g.*, Neb. Rev. Stat. Ann. §§ 53-169(1), 53-171; Ariz. Rev. Stat. Ann. § 4-243(A); ch. 235 Ill. Comp. Stat. §§ 5/6-1.5, 5/6-4(a); N.Y. Alco. Bev. Cont. Law § 101(1). Indeed, Tennessee itself imposes no residency requirement whatsoever for permits to sell liquor by the drink in bars and restaurants for consumption on the premises. *See* Tenn. Code Ann. §§ 57-4-101, 102, 201. Other states allow businesses to satisfy their residency requirements by "incorporating or registering to do business in the State." Resp. Total Wine Br. 4-5 n.2; *see also id.* (noting that "[a]ffiliates of Total Wine are currently operating licensed retail package stores in many of the States that are claimed to have residency requirements, including Arizona, California, Georgia, Kentucky, Massachusetts, Missouri, North Carolina, South Carolina, Virginia, Washington, and Wisconsin").

What a state cannot do is condition eligibility to operate a retail shop on where owners, directors, officers, and stockholders live. The Twenty-first Amendment provides states with regulatory authority over the structure and operation of the alcohol trade. But it does not grant them permission to disre-

gard constitutional imperatives. Regulatory discretion does not excuse deprivations of free speech. *See 44 Liquormart*, 517 U.S. at 516 ("[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."). It does not excuse denials of equal protection. *See Craig v. Boren*, 429 U.S. at 209 ("[T]he Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case."). And it does not excuse economic discrimination against people who live in other states. *See Granholm*, 544 U.S. at 487 ("[T]he Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."). The Sixth Circuit put the point well: Tennessee "is not merely regulating the distribution of alcohol within its borders—it is dictating who can and cannot engage in its economy" based on where people live. Pet. App. 17a n.5.

C. Nondiscriminatory Alternatives.

The final question is whether, notwithstanding its discriminatory character, Tennessee's residency requirement serves a legitimate local purpose that cannot be advanced through nondiscriminatory means. *See Granholm*, 544 U.S. at 489.

The jumping-off point is Tennessee's own (belated) description of its objectives,[5] which stresses the importance of "oversight, control, and

---

[5] As Respondent Total Wine notes, the legislative statement of intent was added two decades after Tennessee enacted a durational residency requirement. *See* Resp. Total Wine Br. 8.

accountability." Tenn. Code Ann. § 57-3-204(b)(4). The residency requirement, the argument runs, fosters these goals because "those who better know a community better serve it," Pet. Br. 49, and because resident retailers are easier to regulate, Pet. Br. 48. Yet the Sixth Circuit had no trouble generating a list of nondiscriminatory paths to the same ends: for example, "requiring (1) a retailer's general manager to be a resident of the state, (2) both in-state and out-of-state retailers to post a substantial bond to receive a license, and (3) public meetings regarding the issuance of a license." Pet. App. 32a. Mechanisms like these ensure local familiarity and facilitate oversight without indulging in protectionism. Petitioner depicts Tennessee's discriminatory law as the product of "experiment[ing] with the best ways of regulating alcohol sales," Pet. Br. 47, but the bounds of permissible experimentation do not encompass "local parochialism." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 43-44 (1980) (striking down state residency requirement for investment advisory businesses).

The practical realities of interstate retailing confirm that laws like Tennessee's cannot be justified by interests in oversight, control, and accountability.

First, as mentioned above, numerous states accomplish the same regulatory objectives as Tennessee without imposing any durational residency requirement. Consider the brief of thirty-five states and the District of Columbia, which is nominally filed in support of Petitioner but which notes on its first page that some of the signatory states "do not impose residency requirements but do

require that retailers have a physical presence in the State." Ill. et al. *Amicus* Br. 1. Likewise, Tennessee itself imposes no residency requirements on retailers selling beer and wine for off-premises consumption, *see* Tenn. Code Ann. §§ 57-5-103 (beer), 57-3-803 (wine), or, as noted above, those selling any alcoholic beverages—beer, wine, and liquor—for on-premises consumption in bars and restaurants, *id.* §§ 57-4-101, 102, 201.

Nor is there any reason to believe that single-state retailers are better equipped or more committed to lawful and orderly behavior than their interstate counterparts. Like single-state sellers, interstate retailers hire and train local employees to staff their stores and operate their cash registers. Those employees do not become any more or less familiar with their communities depending on whether their employer's officers, directors, and stockholders happen to live in Tennessee rather than Kentucky or North Carolina.

When deciding whom to hire, interstate retailers, like their single-state counterparts, must comply with state background check requirements for those who seek to sell alcohol at retail. *See, e.g.*, Ark. Code Ann. § 3-2-103 (authorizing background checks for retail license applicants) Minn. Stat. Ann. § 340A.412 (same). These requirements are both perfectly sensible and entirely unrelated to where a company's top executives live.

Once hired, interstate retailers engage in extensive and ongoing training to allow their

employees to comply with drinking-age laws by, among other things, requiring the presentation of valid identification and recognizing forgeries. In some cases, this training is responsive to state law. *See, e.g.*, Mont. Code Ann. § 16-4-1005 (requiring all licensees to ensure training); Or. Rev. Stat. Ann. § 471.341 (requiring employees found to have sold alcohol to minors to undergo training). In other cases, training may be intended to respond to the needs of local communities. Some interstate retailers that operate in university communities, for example, have designed targeted trainings to combat the higher prevalence of fake identification cards that may be expected in such environments.

In addition to their training programs, interstate retailers' experience operating within multiple regulatory environments may lead to the adoption of compliance mechanisms that draw on best practices from across jurisdictions. For instance, interstate retailers may post a single set of extensive warnings regarding the minimum age to purchase alcohol and the attendant legal penalties in order to ensure compliance with all state and local signage and posting requirements; such warnings will necessarily exceed the requirements in some jurisdictions. Interstate retailers may deploy point-of-sale locking mechanisms that require cashiers to enter an individual's date of birth prior to permitting the sale of alcohol. And many invest in cutting-edge technologies, such as advanced identification card scanners, to further target unlawful behavior.

When it comes to accountability, single-state and interstate retailers alike face the prospect of fines and license revocations for violations. *See, e.g.*, Neb. Rev. Stat. Ann. § 53-1,104 (authorizing "suspension, cancellation, or revocation" of license for repeated unauthorized sales); N.D. Cent. Code Ann. § 5-02-11 (authorizing revocation of license). Notwithstanding Petitioner's insinuations to the contrary, *see* Pet. Br. 48, a retailer's effectiveness at complying with drinking-age laws has nothing to do with where its directors, officers, or stockholders live, *see, e.g.*, *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 313 F. Supp. 3d 751, 765 (W.D. Tex. 2018), *appeal docketed*, No. 18-50299 (5th Cir. Apr. 16, 2018) (finding that the ten largest retailers in a class of alcohol permittees that included out-of-state corporations had fewer alcohol violations per store than did the ten largest retailers in a class of permittees that included only in-state companies).

If anything, interstate retailers are more able to pursue extensive internal accountability mechanisms. For instance, some interstate retailers deploy "secret shoppers" to audit whether employees are lawfully selling alcohol. Where violations are detected, they have required not just the offending employee but the entire team to undergo additional training. Interstate retailers may also utilize internal monitoring systems to track legal infractions and detect problem retail outlets.

What is more, interstate retailers with brick-and-mortar outlets in Tennessee are easy to find, inspect, and tax. *See, e.g.*, Minn. Stat. Ann. §§ 340A.402,

340A.414 (omitting residency from license requirements but requiring "establishment[s] holding a permit under this section [be] open for inspection"); N.J. Stat. Ann. §§ 33:1-25, 33:1-35 (adopting a similar approach). Their assets and investments in the state give retailers even greater incentives to ensure lawful and orderly operations. *See Wal-Mart Stores*, 313 F. Supp. 3d at 765 (finding that "the literature indicates public corporations tend to be very concerned with compliance and reputation"). And, to the extent a state deems it necessary, it can require retailers to post bonds. *Compare* N.Y. Alco. Bev. Cont. Law App. § 81.1 (requiring bonds for all license classes) *with* Liquor—Licenses, Sales, Samples, Bonding Requirements, 1989 Minn. Sess. Law Serv. 49 (repealing bond requirements for retail licenses previously codified at Minn. Stat. Ann. § 340A.412).

Oversight of the alcohol industry is an important objective, and reasonable regulatory minds can differ about the optimal approach. But that is not what is happening in Tennessee. The state has adopted a protectionist regime that shields local sellers from out-of-state competition. The Twenty-first Amendment puts an array of regulatory tools on the table. But the Commerce Clause makes clear that protectionism is not one of them.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

Zayn Siddique
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Kelsi Brown Corkran
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C. 20005
(202) 339-8497
kcorkran@orrick.com

Randy J. Kozel
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

December 20, 2018

No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, INTERIM DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICI CURIAE BRIEF OF THE U.S. ALCOHOL POLICY ALLIANCE AND PUBLIC HEALTH RESEARCHERS AND ADVOCATES IN SUPPORT OF PETITIONER

ELYSE R. GROSSMAN
THE CDM GROUP, INC.
7500 Old Georgetown Rd.
Suite 900
Bethesda, MD 20814

ALLISON L. EHLERT
Counsel of Record
SCOTIA J. HICKS
EHLERT APPEALS
P.O. Box 1024
El Cerrito, CA 94530
(415) 828-5350
allison@ehlertappeals.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. Cheap and Plentiful Alcohol in the Early Twentieth Century Caused Numerous Public-Health Problems, Ultimately Fueling the Drive Toward Prohibition 5

B. Although Alcohol-Related Harms Are Not Present at the Alarming Rates That Characterized the Years Before Prohibition, They Remain a Serious Public Health Problem 8

C. Public-Health Research Shows That Curbing Excessive Alcohol Consumption Requires a Comprehensive Approach That Incorporates a Variety of Regulatory Tools 10

D. Durational Residency Requirements Serve the Twin Goals of Restricting the Availability of Alcohol and Ensuring That Sellers Are Tied to the Communities in Which They Do Business 14

E. Relaxing State Alcohol Controls Leads to More Drinking and More Social Harms ... 17

CONCLUSION 24

APPENDIX - Names of Additional *Amici* .... App. 1

TABLE OF AUTHORITIES

CASES

Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608 (6th Cir. 2018) 17, 19

Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008) 17

Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n, 313 F. Supp.3d 751 (W.D. Tex. 2018) 17, 18

OTHER AUTHORITIES

Alcohol: No Ordinary Commodity—a summary of the second edition, 105 ADDICTION 769 (2010) 12, 14, 18

Jack S. Blocker Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. OF PUB. HEALTH 233 (2010) 5, 7

Carla Alexia Campbell, et al., *The Effectiveness of Limiting Alcohol Outlet Density As a Means of Reducing Excessive Alcohol Consumption and Alcohol-Related Harms*, 37 AM. J. PREV. MED. 556 (2009) 12

Center for Behavioral Health Statistics and Quality, *Results from the 2017 National Survey on Drug Use and Health: Detailed Tables*, Table 2.6B, https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2017/NSDUHDetailedTabs2017.pdf. 9

Centers for Disease Control and Prevention, *Fact Sheets – Underage Drinking*, https://www.cdc.gov/alcohol/fact-sheets/underage-drinking.htm . . 10

Jennifer Cook Middleton et al., *Effectiveness of Policies Maintaining or Restricting Days of Alcohol Sales on Excessive Alcohol Consumption and Related Harms*, 39 AM. J. PREV. MED. 575 (2010) 13

Steven Diamond, *The Repeal Program*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 97 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008) . . . 7

Angela K. Dills and Jeffrey A. Miron, *Alcohol Prohibition and Cirrhosis*, 6 AM. L. AND ECON. REV. 285 (2004) 5, 7

Randy W. Elder et al., *The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms*, 38 AM. J. PREV. MED. 217 (2010) 12, 13

Pamela S. Erickson, *Alcohol Deregulation by Ballot Measure in Washington State* (2014), http://www.healthyalcoholmarket.com/pdf/Alcohol_Deregulation_by_Ballot_Measure_in_Washington_State.pdf 21, 22

Pamela S. Erickson, *The Dangers of Alcohol Deregulation: The UK Experience, 2016 Update*, http://healthyalcoholmarket.com/pdf/UKUpdate2016.pdf 23

RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL (The Center for Alcohol Policy 2011) (1933) 7, 8, 14

Elyse Grossman & James F. Mosher, *Public Health, State Alcohol Pricing Policies, and the Dismantling of the 21st Amendment: A Legal Analysis*, 15 MICH. ST. U. J. MED. & L. 177 (2011) 6

Paul J. Gruenewald, *Regulating Availability: How Access to Alcohol Affects Drinking and Problems in Youth and Adults*, 34 ALCOHOL RESEARCH & HEALTH 248 (2011) 12, 13, 20

E. M. Jellinek, *Recent Trends in Alcoholism and in Alcohol Consumption*, 8 QUARTERLY J. OF STUDIES ON ALCOHOL 40 (1947) 5

Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do*, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 1 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008) 6, 8, 18

Fred Martineau et al., *Population-level interventions to reduce alcohol-related harm: An overview of systematic reviews*, 57 PREV. MED. 278 (2013) 11

Jeffrey A. Miron and Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81 AMERICAN ECONOMIC REVIEW (1991) 7

NABCA RESEARCH, THE THREE-TIER SYSTEM: A MODERN VIEW (2015), *available at* https://www.nabca.org/sites/default/files/assets/files/ThreeTierSystem_Mar2015.pdf 8

Timothy S. Naimi et al., *A New Scale of the U.S. Alcohol Policy Environment and Its Relationship to Binge Drinking*, 46 AM. J. PREV. MED. (2015) 17

National Institute on Alcohol Abuse and Alcoholism, *Alcohol Facts and Statistics* (2018), https://pubs.niaaa.nih.gov/publications/AlcoholFacts&Stats/AlcoholFacts&Stats.pdf 9, 10

Veda Rammohan, *Effects of Dram Shop Liability and Enhanced Overservice Law Enforcement Initiatives on Excessive Alcohol Consumption and Related Harms*, 41 AM. J. PREV. MED. 334 (2011) 12

Terrel L. Rhodes, *Policy, Regulation, and Legislation*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 79 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008) 11

W.J. Rorabaugh, *The Origins of the Washington State Liquor Control Board, 1934*, PACIFIC NORTHWEST QUARTERLY (Fall 2009) 6

Mandy Stahre, et al., *Contribution of Excessive Alcohol Consumption to Deaths and Years of Potential Life Lost in the United States* (June 26, 2014), https://www.cdc.gov/pcd/issues/2014/13_0293.htm 9

Meenakshi S. Subbaraman & William C. Kerr, *Opinions on the Privatization of Distilled-Spirits Sales in Washington State: Did Voters Change Their Minds?* 77 JOURNAL OF STUDIES ON ALCOHOL AND DRUGS 568-76 (2016), https://www.isad.com/doi/full/10.15288/jsad.2016.77.568 22

The Beverage Information and Insights Group, BEER HANDBOOK 2018 16

The Guide to Community Preventive Services, *What Works: Preventing Excessive Alcohol Consumption*, https://www.thecommunityguide.org/sites/default/files/assets/What-Works-Factsheet-Alcohol.pdf 10

Traci L. Toomey & Alexander C. Wagenaar, *Policy Options for Prevention: The Case of Alcohol*, 20 J. PUB. HEALTH POL'Y 192 (1999) ..... *passim*

Andrew J. Treno, et al., *A Review of Alcohol and Other Drug Control Policy Research*, JOURNAL OF STUDIES ON ALCOHOL AND DRUGS 98 (2014) 12, 13, 20

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae U.S. Alcohol Policy Alliance is a nonpartisan, nonprofit group of organizations governed by a board of directors, and guided by an expert advisory board, that translates alcohol policy research into public health practice to prevent and reduce alcohol-related harm in the United States.

Likewise, the *Amici* signatories are organizations comprised of public-health researchers, practitioners, and advocates devoted to studying alcohol regulations, promoting evidence-based reforms, and informing the public about the dangers of excessive alcohol and other drug consumption. "Public health" is the art and science of preventing disease, prolonging life and promoting health through the organized efforts of society. Public health considerations have played a leading role in this country's long-running debate about how best to regulate alcohol. Accordingly, the perspective of those who work in this field is useful to a full understanding of what regulatory responses are effective and the likely consequences of their roll-back.

---

[1] Consistent with Sup. Ct. R. 37.6, *amici curiae* and their counsel state that no counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money for the preparation or submission of this brief. No person other than *amici* contributed money that was intended to fund the preparation or submission of this brief. *Amici curiae* file this brief consistent with the blanket consents given by the parties, copies of which are on file in the Clerk's office.

SUMMARY OF ARGUMENT

Through the experiment with Prohibition and later Repeal, a national consensus emerged that alcohol, unlike most other consumer products, could not be left to the ordinary rules of the marketplace without triggering a host of public health harms, from death and injury associated with excessive drinking, to increased crime, violence, poverty, and other forms of social destabilization. The country's experience with the cheap and widely available alcohol that marked the pre-Prohibition era demonstrated that allowing alcohol suppliers and retailers to engage in the usual free market tactics for pumping up sales was an invitation to serious public health and criminal justice problems.

But Prohibition failed in part because its one-size-fits-all approach was too inflexible to accommodate local variations in how people viewed alcohol and how they used or misused it. In response, the Twenty-first Amendment lodged in the states the primary power to regulate alcohol according to the particular circumstances existing within their jurisdictions. The goal, post-Prohibition, was less about encouraging abstinence and more about minimizing excessive drinking and its associated harms through reasonable regulations.

States set about the task of erecting comprehensive regulatory systems responsive to the needs of their citizens. Public health research has shown that many of these regulations are effective at curbing excessive drinking, including binge drinking, which is far and away the greatest source of alcohol-related harms and the one that imposes the greatest monetary costs on society.

Indeed, the public health evidence is conclusive that regulations that restrict access to and the *availability* of alcohol reduce consumption, which in turn reduces the incidence of adverse health consequences and other deleterious effects. Durational residency requirements like Tennessee's help to moderate the flow of alcohol by limiting the leverage of chain retailers—such as grocery stores, convenience stores, and gas stations—on the alcohol market. Chain outlets often have longer hours and days of operation than their non-chain competitors, and they also have a greater capacity to offer price advantages. As a result, public health research shows that when chain retailers are authorized to sell liquor, its overall availability increases as does consumption and alcohol-related health and social harms.

Tennessee's durational residency requirement addresses another problem, and one that especially bedeviled the country in the pre-Prohibition era: It ensures that retailers have a connection to the communities in which they do business and thus have a greater incentive than out-of-state retailers to be viewed as law-abiding, responsible sales people by their neighbors and friends. Before Prohibition, retailers were often owned or dominated by out-of-state interests that had little reason to care how alcohol affected the communities in which they sold it. Tennessee's durational residency requirement maintains that personalized link between sellers and their patrons and communities.

Although the public health literature has not specifically examined Tennessee's durational residency requirement, it has assessed the state's overall alcohol

control structure. Researchers have concluded that Tennessee's regulatory structure is among the *top three highest scoring* in the country, and its rate of binge drinking—which is necessarily influenced by the state's mix of alcohol policies—is the *lowest* in the country. Tennessee thus appears to be more effective than many of its sister states in striking the appropriate regulatory balance.

Courts and opponents of existing regulations sometimes argue that purportedly objectionable regulations can be replaced by other, hypothetical ones that will serve the same purpose. That, however, is rarely, if ever, true. Each state's alcohol control policies together comprise an edifice in which the various regulations support and reinforce one another. Just as removing a brick or two weakens any structure, the same is true of expunging a particular regulation from a state's overall alcohol control system. When that happens, adverse public health consequences are often not far behind.

In sum, if alcohol is viewed solely through the prism of economics, then a vital consideration—that of alcohol's impact on the public's health—risks being overlooked to our collective detriment. Indeed, it was the public health ramifications of alcohol that propelled the drive to Prohibition, animated policymaking post-Repeal, and remain no less relevant and urgent today.

ARGUMENT

A. Cheap and Plentiful Alcohol in the Early Twentieth Century Caused Numerous Public-Health Problems, Ultimately Fueling the Drive Toward Prohibition.

In the years immediately preceding Prohibition, alcohol consumption in the United States was on the rise. Between 1900 and 1913, beer production nearly doubled, from 1.2 billion to 2 billion gallons, and the volume of spirits on which taxes were paid grew from 97 million to 147 million gallons.[2] In that same timeframe (i.e., 1900 to 1913), the amount of alcohol consumed per capita increased nearly 33 percent, a substantial rise in a short period of time.[3] This created serious public health problems.[4] For instance, the rates of death attributable to liver cirrhosis (15 per 100,000 total population) and chronic alcoholism (10 per 100,000 adult population) were high during this period.[5]

The explosive growth in alcohol consumption that characterized the early twentieth century was due in

---

[2] Jack S. Blocker Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. OF PUB. HEALTH 233-243 (2010).

[3] *Id.* at 235.

[4] *Id.*

[5] Angela K. Dills and Jeffrey A. Miron, *Alcohol Prohibition and Cirrhosis*, 6 AM. L. AND ECON. REV. 285-318 (2004); E. M. Jellinek, *Recent Trends in Alcoholism and in Alcohol Consumption*, 8 QUARTERLY J. OF STUDIES ON ALCOHOL 40 (1947).

no small part to the vertical integration of the industry: Suppliers often owned the retail establishments at which their alcohol was sold, and short of that, they wielded enormous power over the retailers through the use of financial inducements, such as the extension of credit.[6] Through these "tied house" arrangements, out-of-state suppliers drove their retailers to sell as much alcohol as possible.[7] This resulted in "aggressive marketing practices that were beyond the control of local communities."[8] The American saloon, with its steady flow of cheap alcohol, exemplified the problems associated with vertical integration. Indeed, the saloon came to be associated with "political corruption, prostitution, gambling, crime, poverty and family destruction."[9] Against this backdrop, cultural and legal norms became inhospitable to the drinking of alcohol, and the 18th Amendment was passed.

Prohibition was successful in reducing alcohol-related morbidity and mortality. Death rates from cirrhosis and alcoholism, alcoholic psychosis hospital admissions, and drunkenness arrests all declined

---

[6] Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do, in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 1, 6-7 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

[7] *Id.* at 7.

[8] Elyse Grossman & James F. Mosher, *Public Health, State Alcohol Pricing Policies, and the Dismantling of the 21st Amendment: A Legal Analysis*, 15 MICH. ST. U. J. MED. & L. 177, 178 (2011).

[9] W.J. Rorabaugh, *The Origins of the Washington State Liquor Control Board, 1934*, PACIFIC NORTHWEST QUARTERLY (Fall 2009).

steeply during the latter years of the 1910s through the early years after Prohibition went into effect. Even after Repeal, per capita annual consumption stood at 1.2 gallons, less than half the level of the pre-Prohibition period.[10]

However, Prohibition ultimately failed from an enforcement perspective. It was too severe, too inflexible, and failed to consider individual states and their differences.[11] The lesson of Prohibition was that the public's "appetite for liquor could not be completely removed, but only controlled."[12]

The Twenty-first Amendment endeavored to minimize alcohol-related harms by delegating primary regulatory powers to the states, since they were more attuned to the specific problems that alcohol misuse engendered within their borders and could be more nimble in responding to them than the federal government.[13] As policymakers set about the task of mapping out new state-based regulatory systems, they were determined to avoid the evils of "stimulated sales"

---

[10] Jeffrey A. Miron and Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81 AMERICAN ECONOMIC REVIEW 242-47 (1991); Dills and Miron, *supra* note 5; Blocker, *"Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation," supra* note 2, at 237.

[11] RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 6-7 (The Center for Alcohol Policy 2011) (1933).

[12] Steven Diamond, *The Repeal Program, in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 97, 106 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

[13] FOSDICK & SCOTT, *supra* note 11, at 6-8.

that had been the backbone of the saloon.[14] To that end, the states adopted the "three-tier system" in which they walled off suppliers from retailers in part by inserting wholesalers between them. Each tier is separately licensed and regulated, thus precluding vertical integration.[15] Further, the objective of regulation was to allow industry to earn profits, but to prevent it from engaging in competitive practices that could unduly drive up demand, thereby increasing consumption and adverse social consequences.[16]

B. Although Alcohol-Related Harms Are Not Present at the Alarming Rates That Characterized the Years Before Prohibition, They Remain a Serious Public Health Problem.

As it has throughout our history, the misuse of alcohol and the social ills it spawns remains a considerable challenge and one that imposes substantial costs on governments and taxpayers. The following data paint a picture of the nature and magnitude of the problem:

- Excessive alcohol consumption is responsible for approximately 88,000 deaths annually in the

---

[14] *Id.* at 10.

[15] Jurkiewicz & Painter, *supra* note 6, at 7; NABCA RESEARCH, THE THREE-TIER SYSTEM: A MODERN VIEW (2015), *available at* https://www.nabca.org/sites/default/files/assets/files/ThreeTierSystem_Mar2015.pdf.

[16] Jurkiewicz & Painter, *supra* note 6, at 7; FOSDICK & SCOTT, *supra* note 11, at 10.

United States, making it the third leading preventable cause of death, after tobacco and poor diet and lack of physical activity.[17]

- In 2010, alcohol misuse cost the United States $249 billion, with three-quarters of that cost related to binge drinking.[18]
- In 2017, 26.4 percent of people 18 and older reported that they engaged in binge drinking in the past month (binge drinking is defined as a blood alcohol concentration of 0.08 g/dL, which typically occurs after four drinks for women and five drinks for men in about two hours).[19]
- About nine in ten excessive drinkers are not addicted to alcohol. In fact, binge drinking is the most common and most dangerous form of

---

[17] National Institute on Alcohol Abuse and Alcoholism, *Alcohol Facts and Statistics* (2018), https://pubs.niaaa.nih.gov/publications/AlcoholFacts&Stats/AlcoholFacts&Stats.pdf; Mandy Stahre, et al., *Contribution of Excessive Alcohol Consumption to Deaths and Years of Potential Life Lost in the United States* (June 26, 2014), https://www.cdc.gov/pcd/issues/2014/13_0293.htm.

[18] *Alcohol Facts and Statistics*, *supra* note 17.

[19] Center for Behavioral Health Statistics and Quality, *Results from the 2017 National Survey on Drug Use and Health: Detailed Tables*, Table 2.6B, https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2017/NSDUHDetailedTabs2017.pdf.

excessive drinking, and is responsible for more than half of deaths.[20]

- In 2014, 31 percent of driving fatalities were attributable to alcohol impairment.[21]
- Excessive drinking is responsible for more than 4,300 deaths among underage youth each year.[22]

C. Public-Health Research Shows That Curbing Excessive Alcohol Consumption Requires a Comprehensive Approach That Incorporates a Variety of Regulatory Tools.

A robust body of public health research shows that combating alcohol misuse requires a comprehensive approach that takes into account society as a whole and the array of environmental conditions and stimuli that can lead to excessive drinking.[23] Focusing narrowly on alcoholics or other high-risk groups is insufficient because "the majority of alcohol-related death, disability and damage is attributable to moderate

---

[20] The Guide to Community Preventive Services, *What Works: Preventing Excessive Alcohol Consumption*, https://www.thecommunityguide.org/sites/default/files/assets/What-Works-Factsheet-Alcohol.pdf.

[21] *Alcohol Facts and Statistics*, *supra* note 17.

[22] Centers for Disease Control and Prevention, *Fact Sheets – Underage Drinking*, https://www.cdc.gov/alcohol/fact-sheets/underage-drinking.htm.

[23] Traci L. Toomey & Alexander C. Wagenaar, *Policy Options for Prevention: The Case of Alcohol*, 20 J. PUB. HEALTH POL'Y 192, 192-93 (1999).

drinkers who engage in occasional risky drinking, not those who are dependent on alcohol."[24]

No single regulation by itself can do the job, and indeed, the best public health outcomes are associated with a policy environment that includes multiple regulatory mechanisms that complement and reinforce one another. The purpose of these regulations is not to eliminate drinking altogether, but instead to reduce *excessive* drinking and its attendant adverse consequences.[25]

Since the end of Prohibition, the states have been empowered through the Twenty-first Amendment to fashion regulatory tools that take account of the particular conditions within their jurisdictions and the needs of their citizens. Public health research supports the efficacy of many of these tools in helping to *moderate* alcohol consumption and mitigate the harmful effects of *excessive* consumption. These include restricting the outlets at which alcohol may be sold; limiting the days and hours of sale; increasing taxes on alcohol; setting minimum price floors; holding owners and/or servers at "on premise" establishments (such as restaurants and bars) liable for harms caused by excessive alcohol consumption (known as "dram-shop"

---

[24] *Id.* at 192; Fred Martineau et al., *Population-level interventions to reduce alcohol-related harm: An overview of systematic reviews*, 57 PREV. MED. 278, 279 (2013).

[25] Terrel L. Rhodes, *Policy, Regulation, and Legislation*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 79, 82-85 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

liability); and enhancing enforcement of laws aimed at cutting down on drinking and driving.[26]

Perhaps the most well-known regulation is the establishment of the minimum legal drinking age of 21. All states adopted such laws by 1984, when the federal government conditioned the receipt of transportation funding on raising the legal drinking age.[27] That single change in the law has been highly successful in reducing deaths and injuries.[28] Similarly, increasing the price of alcohol through the imposition of taxes has been shown to reduce consumption across all groups, including young people and heavy drinkers.[29] In fact, a

---

[26] Toomey & Wagenaar, *supra* note 23, at 194-200; *Alcohol: No Ordinary Commodity—a summary of the second edition*, 105 ADDICTION 769, 772-73 (2010); Paul J. Gruenewald, *Regulating Availability: How Access to Alcohol Affects Drinking and Problems in Youth and Adults*, 34 ALCOHOL RESEARCH & HEALTH 248, 250 (2011); Andrew J. Treno, et al., *A Review of Alcohol and Other Drug Control Policy Research*, JOURNAL OF STUDIES ON ALCOHOL AND DRUGS 98, 100-01 (2014); Carla Alexia Campbell, et al., *The Effectiveness of Limiting Alcohol Outlet Density As a Means of Reducing Excessive Alcohol Consumption and Alcohol-Related Harms*, 37 AM. J. PREV. MED. 556 (2009); Veda Rammohan, *Effects of Dram Shop Liability and Enhanced Overservice Law Enforcement Initiatives on Excessive Alcohol Consumption and Related Harms*, 41 AM. J. PREV. MED. 334 (2011).

[27] Toomey & Wagenaar, *supra* note 23, at 201.

[28] *Id.*; Treno, et al., *supra* note 26, at 100.

[29] Toomey & Wagenaar, *supra* note 23, at 199; *Alcohol: No Ordinary Commodity*, *supra* note 26, at 772-73; Randy W. Elder et al., *The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms*, 38 AM. J. PREV. MED. 217, 218 (2010).

ten percent increase in the price of alcohol yields a three to ten percent *decrease* in consumption.[30] Other policies that restrict the *availability* of alcohol are likewise potent tools for curbing misuse. Public health research has revealed that the greater the density of alcohol retailers in a community, the greater the consumption and the harms it can cause in those communities, including crime and violence.[31] Other studies have shown that when jurisdictions permit the sale of alcohol on Sundays after previously banning it, they experience an uptick in motor vehicle crashes, driving under the influence, and law enforcement interactions with intoxicated persons.[32]

There have not been any public health studies specifically evaluating the relationship between state residency requirements and alcohol-related harms. This is not surprising, since such studies are difficult and expensive to conduct. That said, the research described above is highly suggestive that durational residency requirements, which reduce the availability of alcohol and enhance retailer accountability, promote public health goals and help maintain the health and safety of communities.

---

[30] Elder, et al., *supra* note 29, at 226.

[31] Toomey & Wagenaar, *supra* note 23, at 197; Gruenewald, *supra* note 26, at 250; Treno, et al., *supra* note 26, at 101.

[32] Jennifer Cook Middleton et al., *Effectiveness of Policies Maintaining or Restricting Days of Alcohol Sales on Excessive Alcohol Consumption and Related Harms*, 39 AM. J. PREV. MED. 575, 585-86 (2010).

D. Durational Residency Requirements Serve the Twin Goals of Restricting the Availability of Alcohol and Ensuring That Sellers Are Tied to the Communities in Which They Do Business.

The single most consistent finding in the public health research is that more availability of alcohol leads to more drinking, and more drinking leads to more negative health outcomes and associated social harms. Indeed, "[r]esearch indicates strongly that as alcohol becomes more available through commercial or social sources, consumption and alcohol-related problems rise."[33] State regulation has therefore naturally focused on limiting the number and type of retailers authorized to sell alcohol.

One of the ways in which Tennessee has chosen to nurture an orderly market in which liquor is regulated is through the durational residency requirement. That requirement ensures that sellers have a stake in the communities in which they do business. Recall that in the aftermath of Prohibition, those involved in designing the new state regulatory systems were determined to avoid re-introducing the "menace" that was the saloon,[34] with its out-of-state owners and their lack of regard for the welfare of the communities in which they peddled cheap alcohol. Tennessee's residency requirement means that retailers live and work in the state and thus their own well-being is at least somewhat bound up with that of their

---

[33] *Alcohol: No Ordinary Commodity*, *supra* note 26, at 773.

[34] FOSDICK & SCOTT, *supra* note 11, at 10.

communities. Indeed, requiring two years of residency, rather than something nominal, like days or weeks, enhances the prospects that retailers are firmly anchored in the state and have meaningful communal relationships that matter to them. Such resident retailers have a greater incentive to comply with alcohol laws and adhere to responsible business practices than do non-resident retailers.

There is a substantial body of research demonstrating that retailers who adopt more scrupulous business practices play a significant role in helping to reduce alcohol-related harms. Such practices include training staff not to serve youth and intoxicated patrons; minimizing the marketing of alcohol, especially the use of advertisements that attract young adults; and refraining from offering happy hours, discount drinks, and drink promotions.[35] Retailers with a stake in the community are more likely to voluntarily abide by these types of sound practices than are retailers with no similar community connection.

Tennessee's durational residency requirement also curtails the availability of alcohol by preventing out-of-state chain stores, such as grocery stores, convenience stores, pharmacies, and gas stations, from selling alcohol. The evidence shows that these kinds of chain retailers contribute to an increase in availability in at least two ways. First, they tend to have extended hours of operation, making it easier for consumers to obtain alcohol when they want it. And second, the scale of their operations means they can sell alcohol more

---

[35] Toomey & Wagenaar, *supra* note 23, at 197-200.

cheaply, such as through larger quantities and lower prices. By limiting the overall number of retailers, Tennessee's residency requirement ensures that the option to purchase liquor exists, but that the state's communities are not flooded with it.[36]

While public health researchers have not specifically assessed the impact of Tennessee's durational residency requirement on the incidence of alcohol-related harms within the state, they have taken stock of its total alcohol policy environment and concluded that it is one of the best in the country. In the study reporting these findings, the researchers explained that they measured each state's policy environment based on a survey of its composite alcohol laws. Tennessee ranked among the top three in the country. The researchers then compared each state's measurement against its rate of binge drinking. Tennessee again performed exceptionally well, with the

---

[36] Data from 2017 shows that Tennessee has 552 "off-premise" retailers that are licensed to sell spirits, and 2,876 "on-premise" outlets that are licensed to do so. Among Tennessee's fellow "license" jurisdictions, four states (Alaska, Arkansas, Delaware, and Rhode Island) and the District of Columbia have fewer "off-premise" spirits outlets. Among all states, both "license" and "control," a total of 12 (Idaho, Montana, New Hampshire, Oregon, Utah, Vermont, West Virginia, and Wyoming, in addition to the four license states identified above) have fewer "off-premise" spirits outlets, as compared to Tennessee. The Beverage Information and Insights Group, BEER HANDBOOK 2018, 176-77. This suggests that Tennessee's durational residency requirement is playing the predictable and desirable role of limiting the availability of spirits within the state.

lowest rate of binge drinking in the country.[37] This is powerful evidence that Tennessee is doing something right.

E. Relaxing State Alcohol Controls Leads to More Drinking and More Social Harms.

Eliminating one or more regulations from a multi-faceted alcohol-control system, or attempting to substitute one regulation for another, often reduces the efficacy of the overall policy architecture. Advocates of deregulation typically argue that jettisoning various controls will benefit consumers through lower prices and greater availability (marketed as customer "convenience"). They ignore the considerable evidence that lower prices and greater availability are the drivers of excessive consumption and therefore that leaving them exclusively to market forces is a recipe for a public health disaster.

Similarly, courts that invalidate particular alcohol regulations sometimes justify their decisions in part by pointing to alternatives that are purportedly capable of accomplishing the same result, as the Sixth Circuit majority did in this case. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 625-26 (6th Cir. 2018); *see also Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n*, 313 F. Supp.3d 751, 776-77 (W.D. Tex. 2018); *but see Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (commenting that, "[t]he district court's suggestion that the State should serve its interest in

---

[37] Timothy S. Naimi et al., *A New Scale of the U.S. Alcohol Policy Environment and Its Relationship to Binge Drinking*, 46 AM. J. PREV. MED. (2015).

some other way disparages the policy choices that Section 2 of the Twenty-first Amendment commits to the states").

However, public health researchers and advocates have found that the implementation of suitable alternatives is, at best, a steep climb. For one thing, state regulatory structures function as a system and, as with most systems, pulling out one piece tends to leave the whole more fragile and less effective. For another, adopting new, substitute regulations is a difficult and time-consuming undertaking that can easily be eclipsed by more pressing legislative or regulatory demands or fall prey to industry interests. Indeed, courts have sometimes pointed to excise taxes as a kind of panacea for promoting state interests in limiting excessive alcohol consumption, *see e.g.*, *Wal-Mart Stores, Inc.*, 313 F. Supp.3d at 776-77, but while there is strong evidence that excise taxes are quite effective, as a practical matter they are seldom imposed.[38] This reluctance likely stems from the general American aversion to taxes of any sort.[39] In fact, over time, the cost of alcohol has declined because alcohol taxes have not been increased to account for inflation and rising incomes; recently, costs have gone down even more owing to changes in federal tax law.[40]

---

[38] Jurkiewicz & Painter, *supra* note 6, at 9; Toomey & Wagenaar, *supra* note 23, at 199; *Alcohol: No Ordinary Commodity*, *supra* note 26, at 772-73.

[39] Jurkiewicz & Painter, *supra* note 6, at 9.

[40] *Alcohol: No Ordinary Commodity*, *supra* note 26, at 773.

The alternative, hypothetical regulations proposed by the Sixth Circuit would almost certainly prove to be burdensome or expensive to administer (or both) and less effective than the straightforward residency requirement. The court concluded that Tennessee could accomplish its goals by requiring a retailer's general manager to be a state resident; by requiring both in-state and out-of-state retailers to post a substantial bond to obtain a license; by holding public meetings into each application for a license; or by creating an electronic database to monitor liquor retailers. *Byrd*, 883 F.3d at 625-26. From a public health perspective, none of these is well-tailored to the task of reducing alcohol-related harms.

Requiring a retailer's general manager to be a state resident falls short because the manager is not subject to the compliance requirements that the actual license-holder is, and the manager is just an employee, who lacks the decision-making authority of the owner.

Second, it's hard to imagine how the posting of a bond would incentivize retailers to engage in more conscientious business practices in the way that actual membership in the community does. The risk of losing some or all of a chunk of money is not the same as the risk of personal harm to one's community standing or harm to one's other interests that are tied to the overall health of the community. And a bond posting might lead chain retailers to dominate the market since they are likely to have the resources to post such a bond, whereas a smaller retailer might not; that in turn could increase the availability of alcohol for the reasons already discussed.

Finally, public meetings to obtain a license and the maintenance of electronic databases would impose substantial staffing and other costs on the state. And public meetings do not promise the same capacity to incentivize *ongoing* responsible business practices, beyond the showing made at the hearing itself. While an electronic database might provide a mechanism for continuing oversight, an entire additional regulatory structure would have to be built and enforcement capacity increased to make the database effective. In short, none of the Sixth Circuit's contemplated alternatives have the built-in capacity to accomplish what the simple, easy-to-implement residency requirement can accomplish.

When deregulation occurs—either through judicial invalidation or otherwise—it is extremely difficult to re-regulate. Deregulation, in turn, is associated with greater outlet density, longer hours of sale, and increased price competition, all of which promote consumption.[41] Deregulation is often pushed by chain retailers, and the experience of the state of Washington serves as a cautionary tale.

Before 2012, Washington controlled the sale of liquor through state-run outlets and the sale of wine was subject to various regulations. The national retailer Costco wanted the ability to sell these products to its customers and to do so at competitive prices. After it failed to get what it wanted through litigation and legislative lobbying, it financed a state-wide ballot initiative intended to deregulate the sale of wine and

---

[41] Treno, et al., *supra* note 26, at 102; Gruenewald, *supra* note 26, at 249-51.

eliminate the state monopoly on the sale of liquor. By arguing that the state needed to modernize its alcohol laws and that customers would benefit from reduced prices and greater convenience in buying alcohol, Costco's gambit worked and Washington voters approved its initiative.[42]

As a result, state liquor stores were shuttered in favor of licensing private retailers. Because the law was written to benefit chain retailers by mandating that only those sellers with at least 10,000 square feet of space could obtain a license, the large outlets like Safeway, Kroger, and Wal-Mart, in addition to Costco, were able to dominate the market.[43]

The initiative dealt a blow to at least two post-Prohibition regulatory measures with a proven track record of success.

First, the initiative weakened the three-tier system of separate and distinct operations at the producer, wholesaler, and retailer levels by basically fusing the wholesale and retail functions for the large chain stores. These stores now have greater control over pricing, which they can use to stimulate sales.[44]

Second, the initiative substantially increased the number of outlets selling spirits. Washington went

---

[42] Pamela S. Erickson, *Alcohol Deregulation by Ballot Measure in Washington State* (2014), http://www.healthyalcoholmarket.com/pdf/Alcohol_Deregulation_by_Ballot_Measure_in_Washington_State.pdf.

[43] *Id.*

[44] *Id.*

from 328 state and contract stores open a maximum of 73 hours a week, to approximately 1,415 stores open a maximum of 140 hours a week. This represented a five-fold increase in outlets.[45]

The dramatic rise in the number of outlets had indisputably increased the *availability* of liquor, a known factor associated with excessive consumption and its attendant social harms.[46] Indeed, an early study of the initiative's impact found that theft of liquor products had increased, as had emergency room visits related to alcohol, and the frequency of youth drinking.[47] Surveys of Washington residents since the passage of the initiative show that they have buyers' remorse and would not vote in favor of it today, knowing what they know now.[48]

Countries that have taken the deregulatory route have also experienced a significant negative impact on public health. A good example of this is the United Kingdom which, over the last five decades, has

---

[45] *Id.*

[46] An early study assessing the initiative's impact found that the price of alcohol had not declined, but that was likely due to certain one-time taxes and fees that the measure had imposed on certain sellers. Whether prices will drop in the mid- to long-term remains to be seen. Erickson, *supra* note 42.

[47] Erickson, *supra* note 42.

[48] Meenakshi S. Subbaraman & William C. Kerr, *Opinions on the Privatization of Distilled-Spirits Sales in Washington State: Did Voters Change Their Minds?* 77 JOURNAL OF STUDIES ON ALCOHOL AND DRUGS 568-76 (2016), https://www.isad.com/doi/full/10.15288/jsad.2016.77.568.

substantially deregulated the sale of alcohol.[49] Alcohol there is now cheaper and more widely available than it was before deregulation.[50] Four large grocery stores dominate the market and they have been permitted to sell alcohol at less than cost to attract customers and increase sales.[51] The results have been notably damaging on public health.[52] For instance, in the ten-year period between 2004 and 2014, the United Kingdom experienced a 13 percent increase in the number of deaths related to alcohol consumption, and almost double the number of hospital admissions related to alcohol.[53]

In sum, deregulation frequently has as its objective and its result making alcohol more widely available. But public health research conclusively demonstrates that greater availability leads to greater consumption, which in turn leads to greater health problems and social ills. From the highly deregulated era preceding Prohibition, to the modern-day examples of the United Kingdom and the state of Washington, curtailing state regulation imposes significant human and financial costs. Invalidating Tennessee's durational residency requirement poses a real danger of weakening the

---

[49] Pamela S. Erickson, *The Dangers of Alcohol Deregulation: The UK Experience, 2016 Update*, http://healthyalcoholmarket.com/pdf/UKUpdate2016.pdf.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

state's overall regulatory scheme and rendering it more vulnerable to those factors—attenuated retailer relationships with the communities they serve and the increased availability of alcohol—that are positively correlated with greater consumption and attendant social harms.

CONCLUSION

The Sixth Circuit's decision did not take account of the public health benefits that durational residency requirements can bestow. Concerns about public health and welfare are integral to this country's historical experience with alcohol and the ways in which the federal and state governments have sought to control it. Therefore, no review of the Constitutional question presented in this case is complete without considering the public health dimension of alcohol regulation.

November 20, 2018

Respectfully submitted,

Elyse R. Grossman
The CDM Group, Inc.
7500 Old Georgetown Rd.
Suite 900
Bethesda, MD 20814

Allison L. Ehlert
Counsel of Record
Scotia J. Hicks
Ehlert Appeals
P.O. Box 1024
El Cerrito, CA 94530
(415) 828-5350
allison@ehlertappeals.com

Counsel for Amici Curiae

APPENDIX

APPENDIX

TABLE OF CONTENTS

Names of Additional *Amici* . . . . . App. 1

APPENDIX—NAMES OF ADDITIONAL *AMICI*

Addiction Policy Forum
Alcohol Justice
American Public Health Association (APHA)
APHA – Alcohol, Tobacco and Other Drugs Section
California Alcohol Policy Alliance
ChangeLab Solutions
Community Anti-Drug Coalitions of America (CADCA)
Drug Free America Foundation, Inc.
Facing Addiction with NCADD
Florida Coalition Alliance
Hillsborough County Anti-Drug Alliance
Institute for Behavior and Health
Institute for Public Strategies
Project Extra Mile
Public Health Advocacy Institute
Michigan Alcohol Policy Promoting Health and Safety
Michigan Council on Alcohol Problems
NAADAC – the Association of Addiction Professionals
National Association for Children of Addiction
Needham Public Health Division
New Futures
Save Our Society from Drugs
Smart Approaches to Marijuana (SAM)
South Dakota Alcohol Policy Alliance
Student Assistance Services Corporation
Students Against Destructive Decisions (SADD)
Tampa Alcohol Coalition
TASC, Inc. (Illinois)
Vital Strategies
WestCare Foundation

No. 18-96

IN THE
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JO MOAK
General Counsel
JACOB HEGEMAN
WINE & SPIRITS WHOLESALERS OF AMERICA, INC.
805 15th Street, NW, Ste. 1120
Washington, DC 20005

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304

MIGUEL A. ESTRADA
Counsel of Record
LUCAS C. TOWNSEND
NATHAN H. JACK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT 1

ARGUMENT 8

I. Section 2 Was Intended To Immunize State Regulation Of In-State Liquor Distribution And Sale Against Dormant Commerce Clause Challenges 9

II. This Court's Precedents Confirm That States Retain Broad Authority To Structure Their Three-Tier Systems 15

III. Durational-Residency Requirements Are Within The Power Reserved To The States By Section 2 24

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

324 Liquor Corp. v. *Duffy*,
479 U.S. 335 (1987) 18

44 Liquormart, Inc. v. *Rhode Island*,
517 U.S. 484 (1996) 17

Arnold's Wines, Inc. v. *Boyle*,
571 F.3d 185 (2d Cir. 2009) 2, 7, 25, 29

Bacchus Imports, Ltd. v. *Dias*,
468 U.S. 263 (1984) 6, 20, 21

BMW of North America, Inc. v. *Gore*,
517 U.S. 559 (1996) 19

Bowman v. *Chi. & Nw. Ry. Co.*,
125 U.S. 465 (1888) 9

Brooks v. *Vassar*,
462 F.3d 341 (4th Cir. 2006) 29

Brown-Forman Distillers Corp. v. *New York State Liquor Authority*,
476 U.S. 573 (1986) 19, 20

Cal. Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*,
445 U.S. 97 (1980) 9, 17, 18, 24

Capital Cities Cable, Inc. v. *Crisp*,
467 U.S. 691 (1984) 4, 5, 16

Carter v. *Virginia*,
321 U.S. 131 (1944) 15

Collins v. *Yosemite Park & Curry Co.*,
304 U.S. 518 (1938) 17

Cooper v. *Tex. Alcoholic Beverage Comm'n*,
820 F.3d 730 (5th Cir. 2016) 32

Costco Wholesale Corp. v. *Maleng*,
522 F.3d 874 (9th Cir. 2008) 25

Craig v. *Boren*,
429 U.S. 190 (1976) 4, 9, 13, 16

Dep't of Rev. v. *James Beam Co.*,
377 U.S. 341 (1964) 16

Dickerson v. *Bailey*,
336 F.3d 388 (5th Cir. 2003) 25

Granholm v. *Heald*,
544 U.S. 460 (2005) 5, 6, 8, 9, 11, 12, 13, 15, 21, 22, 23, 24, 27, 29, 32

Healy v. *The Beer Institute*,
491 U.S. 324 (1989) 19

Hostetter v. *Idlewild Bon Voyage Liquor Corp.*,
377 U.S. 324 (1964) 14, 17, 18

Ind. Brewing Co. v. *Liquor Control Comm'n*,
305 U.S. 391 (1939) 14

James Clark Distilling Co. v. *Western Maryland Railway Co.*,
242 U.S. 311 (1917) 11

Joseph S. Finch & Co. v. *McKittrick*,
305 U.S. 395 (1939) 14

Larkin v. *Grendel's Den, Inc.*,
459 U.S. 116 (1982) 16

Lebamoff Enter. v. *Snyder*,
No. 17-10191, 2018 WL 4679612
(E.D. Mich. Sept. 28, 2018) 33

Leisy v. *Hardin*,
135 U.S. 100 (1890) 9

License Cases,
46 U.S. (5 How.) 504 (1847) 9

Mahoney v. *Joseph Triner Corp.*,
304 U.S. 401 (1938) 13, 14

McDonald v. *Chicago*,
561 U.S. 742 (2010) 15

North Dakota v. *United States*,
495 U.S. 423 (1990) 6, 8, 17, 24, 29

Rhodes v. *Iowa*,
170 U.S. 412 (1898) 10

Scott v. *Donald*,
165 U.S. 58 (1897) 10

South Dakota v. *Wayfair, Inc.*,
138 S. Ct. 2080 (2018) 31

Southern Wine & Spirits of Am. Inc. v.
Div. of Alcohol and Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 3, 27, 28, 30

State Bd. of Equalization of Cal. v.
Young's Mkt. Co.,
299 U.S. 59 (1936) 5, 13, 16

United States v. *Frankfort Distilleries*,
324 U.S. 293 (1945) 12

United States v. *Mississippi Tax*
Comm'n,
412 U.S. 363 (1973) 17

United States v. *Mississippi Tax*
Comm'n,
421 U.S. 599 (1975) 17

Vance v. *W.A. Vandercook Co.*,
170 U.S. 438 (1898) 10

Wisconsin v. *Constantineau*,
400 U.S. 433 (1971) 16

Ziffrin, Inc. v. *Reeves*,
308 U.S. 132 (1939) 5, 14

Statutes

Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121) ("Wilson Act") 10

Act of Mar. 1, 1913, ch. 90 §1, 37 Stat. 699 (codified at 27 U.S.C. § 122) ("Webb-Kenyon Act") 5, 10, 11, 12, 13, 22

Ark. Code Ann. § 3-4-606(a)-(b) 29

Ind. Code Ann. § 7.1-1-1-1 28

Ind. Code Ann. § 7.1-3-21-3 29

Ky. Rev. Stat. Ann. § 243.100(1)(f) 29

La. Stat. Ann. § 26:80(A)(2) 29

Md. Code Ann., Alcoholic Beverages, §3-102 29

Me. Rev. Stat. tit. 28-A, § 1401(5) 29

Mo. Rev. Stat § 311.015 28

Mo. Rev. Stat § 311.060.2(3)-3 29

N.C. Gen. Stat. Ann. § 18B-900(a)(2) 29

Okla. Stat. Ann. tit. 37A, § 2-146(A)(1) 29

S.C. Code Ann. § 61-6-110(2) 29

Tenn. Code Ann. § 57-3-203(b)(1) 3, 8, 29

Tenn. Code Ann. § 57-3-203(f)(1)(A) 3

Tenn. Code Ann. § 57-3-204(b) 3, 8, 27, 28

Wis. Stat. Ann. § 125.04(5)(a)2 29

Wis. Stat. Ann. § 125.01 28

Rules

Supreme Court Rule 37.2 1

Supreme Court Rule 37.6 1

Regulations

Ariz. Admin. Code § R19-1-201(A)(1)(b) 29

Constitutional Provisions

U.S. CONST. amend. XXI, § 2 ..... 4, 12

Other Authorities

76 Cong. Rec. 4,143 (Feb. 15, 1933) (statement of Sen. Blaine) 12

76 Cong. Rec. 4,145 (Statement of Sen. Wagner) 12

Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tiers System Maintains Its Legal Validity and Social Benefits After* Granholm, 14 DePaul Bus. & Com. L.R. (2015) 26, 28

Daniel Glynn, *Granholm's Ends Do Not Justify the Means: The Twenty-First Amendment's Temperance Goals Trump Free-Market Idealism*, 8 J.L. Econ. & Pol'y 113 (2011) 26

H.R. Rep. No. 1461, 62d Cong., 3d Sess., 1 (1913) 11

Joseph E. Kallenbach, *Interstate Commerce in Intoxicating Liquors Under the Twenty-First Amendment*, 14 Temple L.Q. 474 (1940) 14, 15, 23

National Alcohol Beverage Control Association, *Control State Directory and Info*, https://www.nabca.org/control-state-directory-and-info (last visited Nov. 12, 2018) 33

Note, *Constitutional Law—Power of States to Regulate Manufacture and Sale of Liquor Under Twenty-First Amendment*, 14 NYU L.Q. Rev. 361 (1937) 12

Note, *Economic Localism in States Alcoholic Beverage Laws--Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145 (1959) 26, 27, 29

Note, *Legislation, Liquor Control*, 38 Colum. L. Rev. 644, 645 (1938) 10

Christopher G. Sparks, *Out-of-State Wine Retailers Corked*, 30 N. Ill. U. L. Rev. 481 (2010) 2, 25

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

Wine & Spirits Wholesalers of America, Inc. ("WSWA") is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents nearly 400 companies in all 50 states and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. Wholesalers directly account for more than 74,000 jobs paying more than $6.5 billion in wages, and WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States. This case implicates the interests of WSWA and its members because it calls into question the validity of long-standing state laws that regulate the alcohol industry in general, and alcohol wholesalers in particular. WSWA and its members have a strong interest in ensuring that states remain able to determine how best to regulate the distribution and sale of alcohol within their borders.

Alcohol is a unique product in American law and for good reason. The detrimental impacts on individuals, families, and society as a whole that result from overconsumption and underage consumption of alcohol are dramatically different from those related to

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae* states that Petitioner and Respondents have all entered blanket consents on the docket to the filing of *amicus curiae* briefs.

the use of other products, whether measured by scale, severity, nature, or remediability.

Since the end of Prohibition, most states have used a three-tier system to regulate effectively the distribution and sale of wine, beer, and spirits (collectively "liquor" or "alcohol"). The three-tier system generally separates (and separately regulates) the production, distribution, and retail levels. Under this system, a producer of liquor sells its product to a licensed wholesaler, who generally pays applicable state excise taxes and delivers it to a licensed retailer. *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 187 (2d Cir. 2009). The retailer then sells the liquor to consumers and, where applicable, collects state and local sales taxes. *Ibid.* Vertical integration between tiers is generally prohibited. Christopher G. Sparks, *Out-of-State Wine Retailers Corked*, 30 N. Ill. U. L. Rev. 481, 487 (2010).

States have chosen the three-tier system because it allows them to examine records and collect taxes more efficiently, creates effective barriers to the sale of alcohol to minors, and ensures orderly market conditions by preventing monopoly or over saturation of the market. In addition, separating the tiers and directly regulating each one allows states to prevent organized crime from gaining control of alcohol distribution. *See Arnold's Wines*, 571 F.3d at 187. These regulatory systems balance regulation with competition and protect citizens from the harms of alcohol misuse. They have created a transparent and accountable liquor market that is the best in the world for safety, choice, and innovation.

A common feature of three-tier systems is a requirement that retailers and wholesalers be residents

of the state. This requirement flows from the recognition that in-state wholesalers and retailers can more readily be held accountable and are likely to be more socially responsible because they are exposed to the negative consequences that sometimes result from alcohol consumption. *See Southern Wine & Spirits of Am. Inc.* v. *Div. of Alcohol and Tobacco Control,* 731 F.3d 799, 811 (8th Cir. 2013) (Colloton, J). A substantial number of states further require that retailers and wholesalers reside in the state for a certain period of time before being eligible for licenses. For example, the Tennessee statute at issue here requires retailers and wholesalers to reside in the state for two years before applying for a license. *See* Tenn. Code Ann. §§ 57-3-203(b)(1), (f)(1)(A), 57-3-204(b)(2)(A), (3)(A)-(B). These requirements are simply an expression of the same underlying interests that support a residency requirement in the first place: A state is entitled to *define* residency for these purposes as a *bona fide* period of time required for a would-be wholesaler or retailer to become integrated into the community such that it is willing and able to protect the state's interests related to liquor distribution. As Judge Sutton put it below, requiring licensees "to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a.

Nevertheless, Respondents contend, and the Sixth Circuit agreed, that Tennessee's durational-residency requirements violate the Commerce Clause because they are "facially discriminatory and there is no evidence that Tennessee cannot achieve its goals through nondiscriminatory means." Pet. App. 29a. The Sixth Circuit also concluded that "the Twenty-first Amendment does not immunize Tennessee's durational-resi-

dency requirements from scrutiny under the Commerce Clause" because "a three-tier system can still function without these restrictions." Pet. App. 27a.

That gets the constitutional analysis exactly backwards. As the history of the Twenty-first Amendment demonstrates, apart from repealing Prohibition, the whole point of the Amendment was to "create[] an exception to the normal operation of the Commerce Clause." *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). Thus, it has long been understood that the Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984). In this setting, a party who challenges a state liquor regulation as "discriminatory" in violation of the Commerce Clause is, as a practical matter, advancing a claim the Amendment was expressly designed to extinguish.

I. The Twenty-first Amendment prohibits the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI, § 2. As the Amendment's history confirms, the broad language of Section 2 was intended to provide states with plenary authority to regulate liquor free from the constraint of the Commerce Clause.

In the 1880s, the Supreme Court struck down, on dormant Commerce Clause grounds, state laws banning or burdening the sale of imported liquor. Congress responded by enacting the Wilson Act, which was intended to curtail dormant Commerce Clause challenges to state liquor regulations. However, this Court largely vitiated the Act by not allowing states

to discriminate against out-of-state liquor or prohibit shipments from out-of-state sources.

Congress again responded, this time with the Webb-Kenyon Act, which prohibits "[t]he shipment or transportation" of liquor into a state in violation of that state's laws. 27 U.S.C. § 122. Following the failed experiment with Prohibition, the Twenty-first Amendment effectuated a political compromise that allowed commerce in liquor to resume (Section 1) while granting states the plenary authority over in-state distribution and sale of liquor that Congress had previously conferred in the Webb-Kenyon Act (Section 2).

Interpreting Section 2 in the years following ratification, this Court repeatedly held that "[t]he Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 138 (1939); *see also State Bd. of Equalization of Cal.* v. *Young's Mkt. Co.*, 299 U.S. 59 (1936). The text and history of Section 2, as well as this Court's early precedent, confirm that the "aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm* v. *Heald*, 544 U.S. 460, 484 (2005).

II. The Court's more recent decisions have clarified that Section 2 "primarily created an exception to the normal operation of the Commerce Clause," but did not give states carte blanche to ignore "their obligations under other [constitutional] provisions" when regulating liquor. *Capital Cities Cable*, 467 U.S. at 712. For example, the Court has held that Section 2 does not authorize states to enact liquor regulations

in violation of the First Amendment, the Equal Protection Clause, the Export-Import Clause, or the Due Process Clause. Nor may a state regulate in areas "outside of its jurisdiction," *North Dakota* v. *United States*, 495 U.S. 423, 431 (1990), such as by regulating alcohol distribution on federal land or enacting laws that have the practical effect of controlling prices in *other* states. Successful challenges to state attempts to regulate extraterritorially do not, however, suggest the existence of a freewheeling Commerce Clause "exception" to the Twenty-first Amendment. Rather, those are cases in which the Amendment simply does not apply.

With respect to the originally intended scope of the Amendment—displacement of all *dormant* Commerce Clause challenges to state liquor regulation—the Court has recognized only a single, narrow exception to the broad immunity afforded states by the Twenty-first Amendment, and then only very recently. In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the Court held that state regulations passed for "mere economic protectionism" of in-state liquor products—*i.e.*, where the state concedes that the law is designed solely to increase consumption of in-state products—are not shielded from scrutiny under the Commerce Clause. *Id.* at 276. And in *Granholm*, the Court invalidated state laws that allowed local wine producers to ship directly to consumers—thereby avoiding the three-tier system—while requiring out-of-state wine to go through the three-tier system. 544 U.S. at 485. But this exception is extremely narrow. It applies only to overt discrimination against out-of-state *products*. *Granholm* emphatically reiterated that a state has "virtually complete control" over "how to structure the liquor distribution system." *Id.* at 488-89.

III. Like many states, Tennessee has chosen to include durational-residency requirements as core components of its liquor distribution system. These requirements, which do not discriminate against out-of-state liquor products, fall squarely within the zone of state regulatory authority protected by the Twenty-first Amendment from scrutiny under the dormant Commerce Clause.

Residency requirements for wholesalers and retailers have been a common feature of three-tier systems since the ratification of the Twenty-first Amendment. These requirements advance legitimate Twenty-first Amendment interests in temperance, tax collection, and orderly market conditions—which can include preventing monopoly and combatting organized crime—by ensuring that market participants have a meaningful connection to the communities they serve and that the infrastructure for in-state liquor distribution remains subject to state oversight and regulation.

Duration requirements directly advance these interests by *defining* who counts as a *bona fide* resident authorized to do business within the context of the three-tier system. Duration requirements are thus justified on the same grounds as residency requirements—those with established roots in the local community are more likely to be sensitive to local concerns and held accountable by the community. Duration requirements also allow the state to better evaluate the applicant's qualifications and history. Because residency and duration requirements are a staple of many states' three-tier systems, a challenge to these requirements amounts to "a frontal attack on the constitutionality of the three-tier system itself." *Arnold's*

Wines, 571 F.3d at 190. That argument must fail because, as this Court has repeatedly held, the three-tier system is "unquestionably legitimate" under the Twenty-first Amendment. *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432).

ARGUMENT

After Prohibition, many states began regulating the importation, transportation, and distribution of liquor through the "unquestionably legitimate" three-tier system, *Granholm*, 544 U.S. at 489—under which licensed producers sell only to licensed wholesalers, and licensed wholesalers sell only to licensed retailers. Like many states, Tennessee's three-tier system includes a durational-residency requirement for licensed retailers and wholesalers to ensure effective regulatory oversight and public accountability. Tenn. Code Ann. §§ 57-3-204(b)(2)(A), 57-3-203(b)(1).

No party disputes that these provisions would violate the dormant Commerce Clause if the regulated product were books or shoes. But the challenged laws stand on different footing because they regulate alcohol. The text and history of the Twenty-first Amendment, as well as this Court's unbroken precedent interpreting Section 2, confirm that reasonable durational-residency requirements are immunized from invalidation under the dormant Commerce Clause. The Sixth Circuit's decision striking down Tennessee's durational-residency requirements on dormant Commerce Clause grounds should thus be reversed.

I. SECTION 2 WAS INTENDED TO IMMUNIZE STATE REGULATION OF IN-STATE LIQUOR DISTRIBUTION AND SALE AGAINST DORMANT COMMERCE CLAUSE CHALLENGES

The Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). To understand why that is so, it is essential to understand the circumstances that led to the Eighteenth Amendment's prohibition of intoxicating liquors and the political compromise that resulted in the Twenty-first Amendment's ratification.

A. "The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment." *Craig*, 429 U.S. at 205. As far back as the mid-nineteenth century, this Court "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders" under the police powers "free from implied restrictions under the Commerce Clause." *Ibid.* (citing *License Cases*, 46 U.S. (5 How.) 504, 579 (1847)). However, in a series of cases in the 1880s, this Court invoked the dormant Commerce Clause to invalidate state laws banning or burdening the sale of imported liquor. *See Bowman* v. *Chi. & Nw. Ry. Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890). These cases found the state laws to be "repugnant" to the Commerce Clause because liquor sold in its "original package" was part of interstate commerce, which states had no power to interfere with in the "absence of congressional permission." *Leisy*, 135 U.S. at 124-25.

Congress responded by enacting the Wilson Act, which subjected imported liquors to the states' police power "upon arrival in [the] State, . . . to the same extent and in the same manner" as liquor produced in-state, whether or not the liquor was in its "original packages." Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121). Although the Act attempted to protect state liquor regulations from dormant Commerce Clause challenges, a trio of cases in the 1890s rendered the Act ineffectual. *See Scott* v. *Donald*, 165 U.S. 58, 100 (1897) (concluding that the Wilson Act was "not intended to confer upon any State the power to discriminate injuriously against [out-of-state] products" that are "subjects of legitimate commerce"); *Rhodes* v. *Iowa*, 170 U.S. 412, 426 (1898) (holding that "arrival in [the] State" meant that liquor could not be regulated until it had reached its "point of destination"); *Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 451-52 (1898) (holding that the "right to ship merchandise from one State into another" was "wholly unaffected by" the Wilson Act). "In consequence, agents of out-of-state dealers were able to solicit orders from individuals, and have the liquor shipped directly to them." Note, *Legislation, Liquor Control*, 38 Colum. L. Rev. 644, 645 (1938).

To stop this burgeoning mail-order business, Congress enacted (over President Taft's veto) "[a]n act [d]ivesting intoxicating liquors of their interstate character in certain cases," known as the Webb-Kenyon Act. Act of Mar. 1, 1913, ch. 90, § 1, 37 Stat. 699 (codified at 27 U.S.C. § 122). The Webb-Kenyon Act "prohibit[s]" any "shipment or transportation" of "intoxicating liquor" "from one State" "into any State" "in violation of any law of such State." *Id.* As the House Report explained, the bill was "intended to withdraw

the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory and intended to be used therein in violation of the law of such State or Territory." H.R. Rep. No. 1461, 62d Cong., 3d Sess., 1 (1913).

This Court upheld the Webb-Kenyon Act in *James Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311 (1917), which recognized that the Act's "purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *Id.* at 324. The Court explained that, in light of the Webb-Kenyon Act, there is "no possible ground for claiming" that a state law is invalid merely "because the liquor was shipped in interstate commerce." *Ibid.* The Court thus interpreted the Webb-Kenyon Act as "t[aking] the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id.* at 325.

In short, the Webb-Kenyon Act "was an attempt to eliminate the regulatory advantage, *i.e.*, its immunity characteristic, afforded imported liquor," so that states could regulate the internal distribution and sale of liquor unfettered by the dormant Commerce Clause. *Granholm*, 544 U.S. at 482 (citing *Clark Distilling*, 242 U.S. at 324).

B. The national experiment with Prohibition was widely recognized as a failure, and in 1933 the Eighteenth Amendment was repealed by the Twenty-first. But the states would not have ratified the Amendment had it meant returning to the pre-Webb-Kenyon regime where states were powerless to regulate the distribution and sale of liquor that happened to cross state lines. Indeed, the Amendment was "the result of a consistent demand from the states to be permitted

an unrestricted power to regulate the transportation, sale, and use of intoxicating liquor within their respective borders." Note, *Constitutional Law—Power of States to Regulate Manufacture and Sale of Liquor Under Twenty-First Amendment*, 14 NYU L. Q. Rev. 361, 361 (1937). The Twenty-first Amendment thus "made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority" by "subordinating rights under the Commerce Clause to the power of a State to control . . . the traffic in liquor within its borders." *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring).

Section 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI, § 2. As one of the Amendment's authors explained, the purpose of Section 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors." 76 Cong. Rec. 4,143 (Feb. 15, 1933) (statement of Sen. Blaine); *see also id.* at 4,145 (Statement of Sen. Wagner) (expressing concern that a proposed—but ultimately rejected—section that would have given Congress concurrent power to regulate liquor was contrary to the amendment's purpose "to restore to the States control of their liquor problem"). Section 2 thus embodied a compromise that allowed commerce in liquor to resume while ensuring that states could regulate the distribution and sale of liquor free from the constraints of the Commerce Clause.

This compromise was accomplished by effectively constitutionalizing the gist of the Webb-Kenyon Act into Section 2. *See Granholm*, 544 U.S. at 484 (noting

that Section 2 "closely follows" the language of the Webb-Kenyon Act) (quoting *Craig*, 429 U.S. at 205-06); *see also id.* at 514 (Thomas, J., dissenting). As the *Granholm* majority explained, Section 2 "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts," *id.* at 484—including comprehensive regulation of in-state retailers and wholesalers free of any restraints otherwise imposed by the Commerce Clause.

Consistent with that history, this Court's early post-ratification cases held that Section 2 gave states plenary authority to regulate their domestic liquor markets, even when such regulation involved overt discrimination against out-of-state liquor products. For example, in *Young's Market*, the Court upheld a California law imposing a license fee on wholesalers to import beer. Although the law imposed a "direct burden on interstate commerce," the Court held that the fee was authorized by the Twenty-first Amendment. 299 U.S. at 62. The Court rejected the argument that states must "let imported liquors compete with the domestic on equal terms," finding that this "would involve not a construction of the Amendment, but a rewriting of it." *Ibid.* The Court reasoned that the states' authority to prohibit the manufacture and sale of beer included the "lesser" power to impose "a state monopoly of the manufacture and sale of beer" or to "channelize desired importations by confining them to a single consignee." *Id.* at 63.

For several decades the Court adhered to the original view that the Twenty-first Amendment completely immunized states from all dormant Commerce Clause challenges. For example, in *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court stated that it was "settled" that "discrimination

against imported liquor is permissible" under the Twenty-first Amendment. *Id.* at 403 (upholding state law that "clearly discriminate[d] in favor of liquor processed within the State"). Similarly, in *Ziffrin*, the Court declared that "[t]he Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." 308 U.S. at 138. In the same year the Court upheld a Michigan law prohibiting beer dealers from selling any beer manufactured in a state which discriminated against Michigan because even if the law could "properly be described as a protective measure, . . . the law [wa]s valid." *Ind. Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *see also Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 397-98 (1939) ("[T]he right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."). In short, the Court "made clear in the early years following adoption of the Twenty-first Amendment" that under Section 2, "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).[2]

---

[2] One virtue of the absolutist view expressed in *Young's Market* and its progeny was that the Court "relieved itself of the thankless task of trying to define the hazy line between proper and improper state police and revenue measures where interstate business is concerned." Joseph E. Kallenbach, *Interstate Commerce in Intoxicating Liquors Under the Twenty-First Amendment*, 14 Temple L. Q. 474, 482 (1940). It is difficult to differentiate "measures appropriate to a policy of strict regulation for ordinary police or revenue purposes, and measures going

Although more recently the Court has held that state laws enacted solely to protect local liquor *products* from competition by out-of-state products are *not* immunized from dormant Commerce Clause scrutiny, *see* Part II.C-D, *infra*, it has steadfastly maintained that the "aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, 544 U.S. at 484.

II. THIS COURT'S PRECEDENTS CONFIRM THAT STATES RETAIN BROAD AUTHORITY TO STRUCTURE THEIR THREE-TIER SYSTEMS

The Court's recent decisions have clarified that the Twenty-first Amendment does not authorize the states to enact alcohol regulations that violate other constitutional provisions, such as the Equal Protection Clause and Due Process Clause. Nor may states

---

beyond them for economic needs." *Ibid.*; *see also Carter* v. *Virginia*, 321 U.S. 131, 142 (1944) (Frankfurter, J., concurring) (arguing that allowing courts to determine whether a given liquor regulation is "reasonably necessary" would "open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-First Amendment"). As the circuit split addressed in this case illustrates, *Granholm* and *Bacchus* have created confusion as to the interplay between the Twenty-first Amendment and the Commerce Clause. Should the Court be inclined to reconsider those decisions, Justice Brandeis's unanimous opinion in *Young's Market* provides not only a more administrable rule for lower courts to apply, but also the best evidence of the original meaning of Section 2. *Cf. McDonald* v. *Chicago*, 561 U.S. 742, 776-78 (2010) (relying on sources contemporaneous to the ratification of the Fourteenth Amendment to ascertain its original public meaning).

regulate outside their jurisdiction by controlling liquor sales on federal enclaves or setting prices in other states. However, with respect to regulation of *in-state* liquor transportation, distribution and sale, the Court has recognized only a single, narrow exception to the general immunity states enjoy against dormant Commerce Clause challenges: overt attempts by a state to protect its local alcohol products from competition by out-of-state *products*. Aside from that narrow carve-out, this Court has consistently affirmed that states have plenary authority over the in-state alcohol-distribution system, which for many states includes durational-residency requirements for retailers and wholesalers.

A. Recognizing that Section 2 "primarily created an exception to the normal operation *of the Commerce Clause*," this Court has held that the Twenty-first Amendment "does not license the States to ignore their obligations under *other provisions* of the Constitution." *Capital Cities Cable*, 467 U.S. at 712 (emphasis added); *see also Young's Mkt.*, 299 U.S. at 64 (rejecting an argument that authorizing the challenged "licensed-fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution"). For example, the Court has held that the Amendment does not give states authority to: tax imported liquor in violation of the Export-Import Clause, *Dep't of Rev.* v. *James Beam Co.*, 377 U.S. 341 (1964); insulate the liquor industry from equal-protection requirements, *Craig*, 429 U.S. at 204-09; violate due process, *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971); delegate zoning authority related to alcohol sales to churches, *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5

(1982); or impose advertising bans on liquor that contravene the First Amendment, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996).

The Court also has held that the Twenty-first Amendment does not authorize states "to regulate in an area or over a transaction that f[alls] outside of its jurisdiction." *North Dakota*, 495 U.S. at 431. For example, a state may not: regulate alcohol use within a national park, *see Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); regulate a transaction between an out-of-state liquor supplier and a federal military base, *see United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363 (1973); or tax directly a federal instrumentality on an enclave over which the United States exercises concurrent jurisdiction, *see United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599 (1975). The Court has reiterated, however, that "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota*, 495 U.S. at 431 (plurality opinion) (quoting *Midcal Aluminum*, 445 U.S. at 110).

B. The Court first suggested that at least some Commerce Clause challenges to state liquor regulations remained possible in *Hostetter*, where it asserted that the Twenty-first Amendment had not "somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." 377 U.S. at 331-32. The Court reasoned that "[i]f the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Id.* at 332. "Both the Twenty-first Amendment and the Commerce Clause are parts

of the same Constitution," the Court reasoned, and "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.* at 332.

Hostetter was not, however, a *dormant* Commerce Clause case; it involved the federally regulated sale of alcohol to passengers departing Idlewild (now JFK) airport, which the passengers did not even receive until they arrived at their "foreign destination." 377 U.S. at 325. In that context, the Court held that New York's regulations were an impermissible effort "to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." *Id.* at 334.

Applying the same reasoning, the Court has invalidated state statutes that authorized or required liquor pricing schemes that violated federal statutes. *See, e.g.*, *Midcal Aluminum*, 445 U.S. at 114; *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 350 (1987). But these cases, like *Hostetter*, did not implicate the dormant Commerce Clause. Accordingly, neither *Hostetter*, nor *Midcal Aluminum*, nor *324 Liquor* called into question the principle that states have plenary authority to structure their in-state distribution systems as they see fit in the absence of a conflicting exercise of federal authority. On the contrary, as the Court observed in *Hostetter*, the "view of the scope of the Twenty-first Amendment" expressed in *Young's Market* "with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its border has remained unquestioned." *Id.* at 330.

The Court also has recognized that the Twenty-first Amendment does not authorize states to enact liquor laws that have the effect of regulating extra-

territorially. In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down New York's price-affirmation statute, which required liquor distillers and producers selling to wholesalers within the state to sell at a price that is no higher than the lowest price the distiller charges wholesalers in any other state. The effect of the statute was to give New York control over prices in other states. The Court recognized that the Twenty-first Amendment "gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States." *Id.* at 585. And in *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989), the Court reaffirmed that "to the extent that an affirmation statute has the practical effect of regulating out-of-state liquor prices, it cannot stand under the Commerce Clause irrespective of the Twenty-first Amendment." *Id.* at 342.

In short, the text of the Twenty-first Amendment makes clear that the "Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country, or another State." *Brown-Forman*, 476 U.S. at 585. But this is less a "limitation" on (or a Commerce Clause "exception" to) the Twenty-first Amendment than a feature of our federal system of government. State power to impose burdens on interstate commerce is "not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States," which have "'autonomy . . . within their respective spheres.'" *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 571 (1996) (quoting *Healy*, 491 U.S. at 335-36). The Court's cases dealing with extra-

territorial regulation reflect the fact that the Amendment was never intended to authorize one state to invade the police powers of sister states or defy the authority of the federal government. The Amendment simply does not apply in those situations. Those cases thus have little to say about regulations of in-state wholesalers and retailers, and in no way undermine the validity of regulations structuring states' liquor distribution systems. Indeed, the Court in *Brown-Forman* reiterated that states have authority "to regulate the importation and distribution of liquor within their territories." 476 U.S. at 584.

C. The Court made a more dramatic turn from the *Young's Market* understanding of Section 2 in *Bacchus*, which involved a dormant Commerce Clause challenge to a Hawaii law that exempted two locally produced liquors from the 20 percent excise tax imposed on sales of liquor at wholesale. Throughout the litigation, Hawaii offered no Twenty-first Amendment justification (such as temperance, etc.) for the law, but rather defended it solely as an "aid [to] Hawaiian industry." *Id.* at 271. Indeed, "the State expressly disclaimed any reliance upon the Twenty-first Amendment in the court below and did not cite it in its motion to dismiss or affirm." *Id.* at 274 n.12. Although the state belatedly attempted to rely on the Amendment in its merits briefing, *ibid.*, it continued to acknowledge that the "purpose" of the tax "was 'to promote a local industry.'" *Id.* at 276. In this context, the Court held that the relevant "question" was "whether the *principles* underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275 (emphasis added).

Although the Court did not enumerate those principles, it stated that "one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. Accordingly, the Court held that "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Ibid.* Because Hawaii conceded that the law was designed merely "to foster the local industries by encouraging increased consumption of their product," *id.* at 269, the Court held that the tax "violate[d] a central tenet of the Commerce Clause but [was] not supported by any clear concern of the Twenty-first Amendment." *Id.* at 276.

Bacchus thus carved out a very narrow subset of state laws from the broad immunity otherwise afforded by the Twenty-first Amendment—namely, laws enacted purely to protect local liquor manufacturers from competition, thereby discriminating against out-of-state products.

D. The Court's most recent Twenty-first Amendment decision—*Granholm*—is consistent with the view that Section 2 provides states with plenary authority to regulate the structure of their in-state distribution systems unfettered by the Commerce Clause so long as their regulations are not aimed at protecting in-state liquor products from competition by out-of-state products.

In *Granholm*, the Court addressed two state licensing regimes (Michigan and New York) that placed out-of-state wineries at a competitive disadvantage vis-à-vis in-state wineries. Michigan authorized in-state wineries to obtain a license allowing them to

ship directly to consumers, but required out-of-state wineries to distribute their products "through [Michigan's] three-tier system." 544 U.S. at 468-69. "These two extra layers of overhead increase[d] the cost of out-of-state wines to Michigan consumers." *Id.* at 474.

Similarly, New York "channel[led] most wine sales through the three-tier system," but "allow[ed] local wineries to make direct sales to consumers in New York on terms not available to out-of-state wineries." 544 U.S. at 470. This was just "an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system," increasing costs for out-of-state wineries. *Id.* at 474.

The states argued that the Twenty-first Amendment authorized their discriminatory licensing regimes, but a narrow majority of the Court rejected that argument. First, the Court held that the Wilson Act and Webb-Kenyon Act "did not displace[] the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state." 544 U.S. at 483. Second, the Court held that "[t]he Amendment did not give States the authority to pass nonuniform laws in order *to discriminate against out-of-state goods*, a privilege they had not enjoyed at any earlier time." 544 U.S. at 484-85 (emphasis added). Because Michigan and New York's three-tier system applied "only for sales from out-of-state wineries," *id.* at 467, the Court held that the challenged laws "involve[d] straightforward attempts to discriminate in favor of local producers" and thus were "not saved by the Twenty-first Amendment," *id.* at 489. In this regard, *Granholm* involved the same type of overt discrimination against out-of-state products at issue in *Bacchus*. *Id.* at 488-89.

Justice Thomas, joined by the Chief Justice and Justices Stevens and O'Connor, dissented. Although he agreed that the Twenty-first Amendment unquestionably allows states to control their liquor distribution systems, Justice Thomas would have held that the Webb-Kenyon Act and Twenty-first Amendment both displace any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers, even if those regulations discriminate against out-of-state liquor. 544 U.S. at 497-98, 517-18 (Thomas, J., dissenting). Justice Thomas noted that following ratification of the Twenty-first Amendment, "[m]any States had laws that discriminated against out-of-state products in addition to out-of-state wholesalers and retailers." 544 U.S. at 518-19 (Thomas, J., dissenting) (discussing state statutes); *see also Interstate Commerce*, 14 Temple L.Q. at 483 (noting that 34 states had laws that "discriminate[d] against out-of-state alcoholic beverages) (citation omitted). He argued that this "contemporaneous state practice refute[d] the Court's assertion that the Twenty-first Amendment allowed States to discriminate against out-of-state wholesalers and retailers, but not against out-of-state products." *Granholm*, 544 U.S. at 520.

Although the Court was closely divided as to whether the Twenty-first Amendment allows states to engage in protectionism designed to disadvantage out-of-state products—largely because they disagreed about the history and scope of the Wilson Act and Webb-Kenyon Act—all nine Justices agreed that the Twenty-first Amendment authorizes states to "mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." *Id.* at 466; *see also id.* at 520 (Thomas, J., dissenting). As the majority opinion therefore took pains to em-

phasize, *Granholm* did not "call into question the constitutionality of the three-tier system." *Id.* at 488. Rather, it held that "State policies are protected under the Twenty-first Amendment" so long as "they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. Indeed, *Granholm* specifically observed that states have "virtually complete control over whether to permit importation or sale of liquor and how to structure the *liquor distribution system*." *Id.* at 488 (emphasis added) (quoting *Midcal Aluminum*, 445 U.S. at 110).

Of particular note, in emphasizing the "unquestionabl[e] legitima[cy]" of the three-tier system, the *Granholm* majority quoted approvingly Justice Scalia's concurring opinion in *North Dakota*, which had expressly recognized that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring)). Thus, even under *Granholm* and *Bacchus*, state regulation of in-state liquor distribution and sale—including through a three-tier system that incorporates residency and duration requirements—is shielded from dormant Commerce Clause scrutiny.

III. DURATIONAL-RESIDENCY REQUIREMENTS ARE WITHIN THE POWER RESERVED TO THE STATES BY SECTION 2

As part of its three-tier system of liquor regulation, Tennessee imposes reasonable durational-residency requirements on retailers and wholesalers. Residency requirements are designed to promote the very interests the Twenty-first Amendment authorizes states to protect—including temperance, crime

prevention, and tax collection. And a *duration* requirement merely establishes the minimum time a particular state decides is reasonably necessary for a retailer or wholesaler to become sufficiently rooted in the community; it thus demarcates *bona fide* residents from those deemed insufficiently established in the community to help protect those interests. Here, Tennessee's durational-residency requirements fulfill that Twenty-first Amendment role, and do not exceed reasonable limits on the state's legislative choices. They are thus immunized from scrutiny under the dormant Commerce Clause.

A. The compromise memorialized in the Twenty-first Amendment granted each state authority to regulate liquor within its jurisdiction in the manner that best fits its particular circumstances. Most states have used this authority to regulate liquor distribution through the three-tier system. Sparks, 30 N. Ill. U. L. Rev. at 486-87. Historically, "[t]he main purpose of the three-tier system was to preclude the existence of a 'tied' system between producers and retailers, a system generally believed to enable organized crime to dominate the industry." *Arnold's Wines*, 571 F.3d at 187; *see also* Sparks, 30 N. Ill. U. L. Rev. at 488. "Some courts have also recognized the prevention of monopolies" as a valid state interest furthered by the three-tier system, *Dickerson* v. *Bailey*, 336 F.3d 388, 404 (5th Cir. 2003), while others have noted states' interests in "promotion of orderly markets," *Costco Wholesale Corp.* v. *Maleng*, 522 F.3d 874, 902 n.23 (9th Cir. 2008). States have also long "assert[ed] that the three-tier regulatory system allows the state to collect taxes more efficiently and prevent the sale of alcohol to minors." *Arnold's Wines*, 571 F.3d at 188; *see also* Sparks, 30 N. Ill. U. L. Rev. at 488. Some states have also adopted a three-tier system as a way

of promoting temperance. Daniel Glynn, *Granholm's Ends Do Not Justify the Means: The Twenty-First Amendment's Temperance Goals Trump Free-Market Idealism*, 8 J.L. Econ. & Pol'y 113, 133 (2011). Today, the three-tier system serves many of these same purposes while protecting citizens from the negative consequences of adulterated or counterfeit products, evasion of state excise taxes, sales to underage and intoxicated consumers, and drunk driving, among other harms.

Wholesalers are the vital middle tier in this well-established system, linking producers and retailers. Since products must generally pass through a wholesaler, wholesalers play an indispensable role in states' regulation of the alcohol marketplace. For many states, wholesalers are the single point of excise tax collection. Wholesalers help ensure that liquor distributed to retailers is genuine and unadulterated. They also promote competition by providing distribution logistics to small brands and retailers, enabling them to compete effectively with large national brands and chains, fostering consumer choice. And wholesalers act as a central authority for developing and implementing comprehensive policies on the prevention of underage access and drunk driving. *See generally* Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tiers System Maintains Its Legal Validity and Social Benefits After* Granholm, 14 DePaul Bus. & Com. L.J. 209 (2015).

As part of their three-tier systems, many states "limit the issuance of retail, wholesale, and manufacturing licenses to residents of the state or to domestic corporations." Note, *Economic Localism in States Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148

(1959); *see also Granholm*, 544 U.S. at 518 n.6 (Thomas, J., dissenting) (listing state statutes with residency and physical presence requirements). States reasonably view such residency requirements as a legitimate exercise of their Twenty-first Amendment authority.

Most importantly, residency requirements ensure that someone within the state's jurisdiction can be held accountable. For example, Tennessee justifies its residency requirements for retailers on the ground that "it is in the interest of th[e] state to maintain a higher degree of oversight, control and accountability for individuals involved in" liquor retailing. Tenn. Code Ann. § 57-3-204(b)(4). Similarly, because residency "facilitates law enforcement against wholesalers," states use residency requirements "for close control over the licensees and for amenability to prosecution." *Economic Localism*, 72 Harv. L. Rev. at 1149. States may reasonably believe that local wholesalers are more likely than their out-of-state counterparts to fear prosecution by the state and thus to conform their conduct to state policy.

Residency requirements also reflect the reasonable belief that in-state wholesalers and retailers may be "more apt to be socially responsible" and thus better suited than out-of-state counterparts to promote temperance. After all, in-state "officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce." *Southern Wine & Spirits*, 731 F.3d at 811. A legislature could "sensibly . . . suppose" that state residents "are more likely [than non-residents] to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter

day-to-day in ballparks, churches, and service clubs." *Ibid.*

Similarly, states reasonably view residency requirements as an effective tool for ensuring that the infrastructure for in-state liquor distribution remains subject to state oversight. Many states, for example, require wholesalers to maintain their warehouses in-state to facilitate inspections and promote oversight. *Three Cheers for Three Tiers*, 14 DePaul Bus. & Com. L.J. at 219. Given their susceptibility to prosecution and their exposure to the negative consequences sometimes caused by liquor, in-state wholesalers and retailers are also likely to be more vigilant about preventing "unlawful diversion of liquor" from regulated to unregulated channels. *North Dakota*, 495 U.S. at 431. States may also believe that they can better rely on in-state wholesalers to collect any applicable excise taxes and on in-state retailers to collect sales taxes, *see, e.g.*, Wis. Stat. § 125.01—an especially weighty concern for states confronting budget deficits. Indeed, these interests are why states reasonably can require that "all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment).

Many states expressly identify these Twenty-first Amendment interests as the reasons for their chosen distribution systems generally—and for residency requirements specifically. *See, e.g.*, Tenn. Code Ann. § 57-3-204(b)(4); Ind. Code Ann. § 7.1-1-1-1; Mo. Rev. Stat § 311.015; Wis. Stat. Ann. § 125.01. For these states, and others like them that require in-state residency for wholesalers and retailers, "an argument that compares the status of an in-state retailer with an out-of-state retailer" is "nothing different than an

argument challenging the three-tier system itself." *Brooks* v. *Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (op. of Niemeyer, J.); *Arnold's Wines*, 571 F.3d at 190. Yet this Court has repeatedly held that the three-tier system is "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432).

B. States implementing liquor distribution systems after Prohibition "[o]ften" required "a fixed period of prior residence" to obtain a retailer or wholesaler license. *Economic Localism*, 72 Harv. L. Rev. at 1148. Today, 15 states impose some form of durational-residency requirement for wholesalers, with some states requiring as little as 30 days of residence and others requiring as long as five years.[3] Even more states impose durational residency requirements for retailers. *See* Petn. 24 n.3.

These requirements are supported by the same interests that justify a residency rule in the first place—a state surely has a significant interest in determining the minimum residency it deems necessary for purposes of alcohol regulation. As Judge Sutton recognized, if states may "require retailers and wholesalers to reside within their borders"—which *Granholm* has said they may—they "must 'have flexibility to define the requisite degree of in-state presence' necessary for

---

[3] Ariz. Admin. Code § R19-1-201(A)(1)(b) (residency); Ark. Code Ann. § 3-4-606(a)-(b) (five years); Ind. Code Ann. § 7.1-3-21-3 (five years); Ky. Rev. Stat. Ann. § 243.100(1)(f) (one year); La. Stat. Ann. § 26:80(A)(2) (two years); Me. Rev. Stat. tit. 28-A, § 1401(5) (six months); Md. Code Ann., Alcoholic Beverages, § 3-102 (two years); Mo. Rev. Stat § 311.060.2(3)-3 (three years); N.C. Gen. Stat. Ann. § 18B-900(a)(2) (residency); Okla. Stat. Ann. tit. 37A, § 2-146(A)(1) (five years); S.C. Code Ann. § 61-6-110(2) (30 days); Tenn. Code Ann. § 57-3-203(b)(1) (two years); Wis. Stat. Ann. § 125.04(5)(a)2 (90 days).

participating as a retailer or wholesaler." Pet. App. 50a (quoting *S. Wine*, 731 F.3d at 810). In other words, each state must be free to choose a period of time that, in its reasonable judgment, shows that the residency is not only *bona fide* but also is likely to lead to the types of community ties that would make the resident sufficiently attuned to the concerns of the resident's new community. And it is certainly reasonable for a state legislature to believe that "[r]equiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a. It is also reasonable for states to conclude that a period of sustained in-state presence helps to ensure accountability to government authorities, facilitate the task of regulators in vetting applications, increase their familiarity with regulated parties, ease inspections of storage facilities and required records, and mete out any required discipline—all interests at the core of the states' Twenty-first Amendment powers. A person who lacks sufficient ties to the community is less likely to feel a sense of accountability and therefore is a greater risk of being a "fly by night" who ignores public safety concerns.

This is not to say, of course, that states may impose *any* sort of durational-residency requirement. Under even the most deferential standard of review, a durational-residency requirement that is wholly irrational could be struck down under the Equal Protection Clause or other constitutional provision. For example, a state could be prohibited from requiring that every living relative of a prospective wholesaler reside in the state—not because such restrictions violate the dormant Commerce Clause, but because they are not

a reasonable exercise of the state's authority to regulate alcohol distribution within its borders. In fact, Judge Sutton concluded that Tennessee's rule requiring 10-year residency for a license renewal was "the epitome of arbitrariness" in light of the two-year requirement for the initial license. Pet. App. 55a. Here, however, it was not unreasonable for Tennessee to determine that two years of residence are necessary for a would-be retailer or wholesaler to become sufficiently integrated in the community and committed to its welfare. Courts must accord due deference to states' choices in determining how best to meet the needs of their respective circumstances.

This deference is not diminished by recent changes in technology. Although this Court has revisited its dormant Commerce Clause jurisprudence in other contexts in light of "the Internet revolution" and the changing dynamics of "[m]odern e-commerce," the Court has been careful not to infringe "on States' authority to collect taxes and perform critical public functions." *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2095, 2097 (2018). Where alcohol is concerned, those critical public functions include imposing durational residency requirements on both retailers and wholesalers to ensure that the three-tier system fulfills its purposes. In any event, states are not obligated to embrace every aspect of the Internet economy—especially when the product concerned has the capacity to inflict societal harms if abused. The Twenty-first Amendment permits states to choose from a spectrum of options in regulating the use and distribution of liquor within their borders, and courts are not empowered to assess the wisdom of these choices or to determine whether they need "updating" in light of new commercial realities.

C. The Sixth Circuit majority struck down Tennessee's durational residency requirements because, in its view, "a three-tier system can still function without these restrictions." Pet. App. 27a. In so holding, however, the panel countermanded the Tennessee legislature's reasonable judgment that durational-residency requirements best serve the policy interests underlying Tennessee's three-tier system. It is no answer to say that that durational-residency requirements are not "inherent" in the three-tier system, Pet. App. 27a. No state is *required* by the Amendment to adopt a particular form of the three-tier system, and thus the Sixth Circuit's distinction between those attributes of the system that are "inherent" or somehow essential has no footing in the Constitution. Indeed, the three-tier system itself is not essential, but this Court has never held that the system is invalid merely because a state *could* do without it. *See Granholm*, 544 U.S. at 488.

Nor is there any constitutional basis for upholding in-state residence requirements but not *durational*-residency requirements. *See Cooper* v. *Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016). Nothing in the Twenty-first Amendment's text or history supports a distinction between according states the power to require "residency" but denying them the authority to define what residency *means* by stipulating a particular period of time. Nor are there any obvious judicially manageable standards that would permit courts throughout the country to know when the legislative choice between x and y years exceeds constitutional bounds—at least absent statutory periods bordering on irrationality or demonstrably offensive to other constitutional provisions. Indeed, a *dormant* Commerce Clause challenge provides an es-

pecially incongruous context to make such distinctions, since the Twenty-first Amendment was expressly meant to preclude such challenges.

The point of Section 2 was to give each state the power to chart its own course in liquor regulation. But applying the Sixth Circuit's test would lead to the elimination of *all* Twenty-first Amendment immunity. For example, at least one court applying *Byrd*'s "inherent" aspect test has struck down portions of Michigan's three-tier system that distinguish between in-state and out-of-state *retailers*, not merely *products*. *See Lebamoff Enter.* v. *Snyder*, No. 17-10191, 2018 WL 4679612, at *5 (E.D. Mich. Sept. 28, 2018). That ruling, like the Sixth Circuit's decision, strikes at the heart of states' authority to structure their three-tier systems as they think best. Moreover, as both decisions fail to appreciate, the fact that some states have adopted specific regulations—such as durational-residency requirements—while others have not is a *feature* of the Twenty-first Amendment's grand compromise, not a judicially-correctable "defect."

Indeed, a state is free to dispense with the three-tier system entirely and instead implement a state monopoly over distribution—and some states have chosen to do. *See* National Alcohol Beverage Control Association, *Control State Directory and Info*, https://www.nabca.org/control-state-directory-and-info (last visited Nov. 12, 2018). If states are prohibited from defining requirements for distribution channels to address local concerns, more states may elect to implement a state monopoly. Thus, a decision holding that states lack authority to set durational-residency requirements may lead to a dampening of private market forces, not a free-market panacea, as states choose to exercise even greater control through

state-run distribution systems. Policy arguments against "protectionism" may carry the day in other contexts, but they should not prevail here because the Twenty-first Amendment gives states "nearly unfettered" authority to structure their liquor distribution systems to mitigate the negative consequences that sometimes result from alcohol consumption and foster public accountability.

* * *

Durational-residency requirements are a legitimate exercise of state regulatory authority under the Twenty-first Amendment. A decision categorically invalidating those requirements under the dormant Commerce Clause would call into question the validity of the three-tier system itself and start the Court down the path of effectively reading Section 2 out of the Twenty-first Amendment. This Court should decline Respondents' invitation to rewrite the Constitution.

CONCLUSION

The Court should reverse the Sixth Circuit's decision.

Respectfully submitted.

JO MOAK
General Counsel
JACOB HEGEMAN
WINE & SPIRITS WHOLESALERS OF AMERICA, INC.
805 15th Street, NW, Ste. 1120
Washington, DC 20005

MIGUEL A. ESTRADA
Counsel of Record
LUCAS C. TOWNSEND
NATHAN H. JACK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
mestrada@gibsondunn.com

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
PALO ALTO, CA 94304

Counsel for Amicus Curiae

November 20, 2018

No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS
RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, Executive Director of the
Tennessee Alcoholic Beverage Commission, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WINE AND SPIRITS WHOLESALERS OF TENNESSEE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Henry E. Hildebrand, III
General Counsel
Counsel of Record
Wine and Spirit Wholesalers
of Tennessee, Inc.
150 Fourth Avenue, North
Suite 1820
Nashville, TN 37219
615-810-8777
hhildebrand@fpwlegal.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

A. The Dormant Commerce Clause is a court created doctrine which should not be used to undo a valid state regulation. 2

B. If the Dormant Commerce Clause retains any validity, it should not invalidate statutes and rules regulating alcohol. 2

C. Even if the Dormant Commerce Clause is applicable, in a limited way, to the sale and distribution of alcohol within a state, a statute governing the residency of an applicant is a core issue of the Twenty-First Amendment and is not rendered invalid. ... 3

ARGUMENT 5

I. The Dormant Commerce Clause does not invalidate the durational residency provisions of Tennessee State Law. 5

II. If the Dormant Commerce Clause is applicable to the distribution of alcohol, notwithstanding the prohibition of Section 2 of the Twenty-First Amendment, the application of a residency requirement remains within the purview of state authority. 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Bibb v. Navajo Freightlines, Inc.,
359 U.S. 520 (1959) 2

Byrd v. Tennessee Wine and Spirits Retailers Association,
883 F.3d 608 (6th Cir. 2018) 11

California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,
445 U.S. 97, 100 S. Ct. 837. 63 L. Ed. 2d 233 (1980) 7

City of Chattanooga v. Tennessee Alcoholic Beverage Commission,
525 SW.2d 470 (Tenn. 1975) 4

Dept. of Revenue v. Jones B. Beam Distilling Co.,
377 U.S. 341, 84 S. Ct. 1247. 12 L. Ed. 2d 362 (1964) 8

Granholm v. Heald,
544 U.S. 460, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005) 8, 9, 13, 14

Hughes v. Oklahoma,
441 U.S. 322 (1979) 2

Hostetter v. Idlewild Bon Voyage Liquor Mart Corp.,
377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 38 (1964) 8

Kassel v. Consolidated Freightways Corporation of Delaware,
450 U.S. 662 (1981) 2, 3

Lebamoff Enterprises v. Huskey,
666 F.3d 455 (7th Cir. 2012) 7

Leisy v. Hardin,
135 U.S. 100, 105 S. Ct. 681, 34 L.Ed. 128 (1890)
..... 5

North Dakota v. United States,
495 U.S. 423, 110 S. Ct. 1986, 109 L. Ed. 2d 420
(1990) 9

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 2

Scott v. Donald,
165 U.S. 58, 17 S. Ct. 265, 41 L.Ed. 632 (1897) .. 6

Southern Pacific Co. v. State of Arizona,
325 U.S. 761 (1945) 2

Southern Wine & Spirits of America, Inc. v. Div. of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 10

State Board of Equalization of California v. Young's Market Co.,
299 U.S. 59 (1936) 7

Swedenburg v. Kelly,
358 F.3d 223 (2nd Cir. 2004) 14

TFWS, Inc. v. Schaefer,
242 F.3d 198 (4th Cir. 2001) 7

United States v. Frankfort Distillers,
324 U.S. 293 (1945) 7

Wine Country Gift Baskets.com v. Steen,
612 F.3d 809 (5th Cir. 2010) 9

STATUTES

27 U.S.C. § 121 5

27 U.S.C. § 122 5

Tenn. Code Ann. § 57-3-102 11

Tenn. Code Ann. § 57-3-106 11

Tenn. Code Ann. § 57-3-203-(b)(1) 4

Tenn. Code Ann. § 57-3-203-(f)(1)(A) 4

Tenn. Code Ann. § 57-3-203(g) 4

Tenn. Code Ann. § 57-3-204 4

Tenn. Code Ann. § 57-3-204(b)(2) 3

Tenn. Code Ann. § 57-3-204(b)(3)(A) 3

Tenn. Code Ann. § 57-3-204(b)(3)(B) 3

Tenn. Code Ann. § 57-3-208(b) 12

Tenn. Code Ann. § 57-3-801 11

Tenn. Code Ann. § 57-4-103 11

Tennessee Regulation Rule 0100-03-.09 12

Tennessee Regulation 0100-03-.15(6) 13

OTHER AUTHORITIES

Docket entry for November 13, 2018 – Letter of Clayton Byrd, Executive Director of the Tennessee Alcoholic Beverage Commission submitted, signed by the Tennessee Attorney General 14

Michie's Code of 1934, § 6648.7 4

October 2018 Meeting Minutes available at: https://www.tn.gov/content/dam/tn/abc-documents/abc-documents/Oct2018_CM_MMRCM_MeetingMinutes.pdf 11

TABC Frequently Asked Questions available at www.tn.gov/abc/publicinformation-and-forms/frequently-asked-questions.html 13

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Wine and Spirit Wholesalers of Tennessee (WSWT) is a non-profit trade association composed of businesses and individuals involved in the distribution and wholesale marketing of wine and distilled spirits within the State of Tennessee.[1] The membership of the WSWT have businesses located across the State of Tennessee and include publicly traded companies, private, multi-state operations, and family-owned businesses. All of the members of the WSWT are active participants in their businesses and are involved in the safe and legal distribution of wine and spirits within the State of Tennessee. The WSWT's current board of directors, the Chairman of the Board, and the President of the WSWT, Tom Hensley, have directly authorized Henry E. Hildebrand, III, General Counsel for the WSWT, to prepare and submit this *amicus curiae* brief on behalf of the WSWT.

---

[1] Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored the brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made any such monetary contribution.

SUMMARY OF ARGUMENT

A. The Dormant Commerce Clause is a court created doctrine which should not be used to undo a valid state regulation.

The Dormant Commerce Clause is an inferred but unwritten doctrine that courts have drawn from Article 1, Section 8 of the Constitution. Congress has been conferred specific authority to regulate interstate commerce in this section. When Congress specifically and expressly acts in the realm of interstate commerce, such action preempts state legislation. Where Congress does not act, courts infer that the Constitution prohibits states from enacting any legislation, irrespective of whether that legislation contravenes a Congressional mandate, if in the view of the Court, the effect of that state legislation impacts or places a burden upon interstate commerce.

B. If the Dormant Commerce Clause retains any validity, it should not invalidate statutes and rules regulating alcohol.

Historically, this Court has found an infringement of the Dormant Commerce Clause, even though there is no express statement of preemption in a variety of areas. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761 (1945) [the maximum length of a train]; *Bibb v. Navajo Freightlines, Inc.*, 359 U.S. 520 (1959) [the proper shape and size of mudguards used in trucking]; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) [the appropriate size of crates for the transport and delivery of cantaloupes]; *Hughes v. Oklahoma*, 441 U.S. 322 (1979) [the transportation of minnows procured in Oklahoma]; *Kassel v. Consolidated Freightways*

Corporation of Delaware, 450 U.S. 662 (1981) [the use of double bottom trucks on the highways of Iowa greater than 60 feet]. None of this preemption should be applied to the regulation of alcohol sales.

C. Even if the Dormant Commerce Clause is applicable, in a limited way, to the sale and distribution of alcohol within a state, a statute governing the residency of an applicant is a core issue of the Twenty-First Amendment and is not rendered invalid.

Tennessee law has long preserved local control over how and who may distribute alcoholic beverages. This local control has included limiting the residence and conduct of license owners as well as licensees. Tennessee law prohibits the issuance of a retail package store license to any individual "who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the Commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years."[2] The Alcoholic Beverage Commission may issue a retail license to a corporation so long as no officer, director, or stockholder is precluded from holding a license due to the residency of the officer, manager or stockholder.[3] Tennessee law similarly requires the applicant for a wholesale license to either be "individuals who are

---

[2] See Tenn. Code Ann. § 57-3-204(b)(2).

[3] See Tenn. Code Ann. § 57-3-204(b)(3)(A), (B).

citizens of [the] state [of Tennessee] and either have been for at least the two (2) years next preceding citizens of [the] state [of Tennessee] or have been citizens of [the] state [of Tennessee] at any time for at least fifteen (15) consecutive years."[4]

Tennessee would grant wholesale licenses to corporations as long as the stockholders of such corporations holding a wholesale license to either be residents of the state for five (5) years or have, at any time, been a resident for at least fifteen (15) years.[5] Tennessee law allows the stockholders of a corporation holding a wholesale license to be nonresidents if the wholesale license has been held by the corporation for a least twenty-five (25) years.[6]

Tennessee's involvement in identifying all of the owners of a retail permit is specifically designed to permit the local citizenry to evaluate whether the right to distribute alcoholic beverages should be granted to an applicant. It is axiomatic that for the citizenry to be knowing participants in the process, they must know the applicants.[7]

---

[4] Tenn. Code Ann. § 57-3-203-(b)(1).

[5] Tenn. Code Ann. § 57-3-203-(f)(1)(A).

[6] Tenn. Code Ann. § 57-3-203(g).

[7] As originally enacted, Tenn. Code Ann. § 57-3-204 [then codified as § 6648.7, Michie's Code of 1934] required a local official to state that the applicant is a person of good moral character "and is personally known to the official signing the certificate..." See *City of Chattanooga v. Tennessee Alcoholic Beverage Commission*, 525 SW.2d 470 (Tenn. 1975). Although this statute was subsequently

ARGUMENT

I. The Dormant Commerce Clause does not invalidate the durational residency provisions of Tennessee State Law.

Prior to the enactment and the national adoption of prohibition, Congress sought to confer the right to regulate the sale and distribution of alcoholic beverages to the various states. The Court held that alcohol was an article of commerce and a state statute which prohibited sales of alcohol within its borders could not be enforced against alcohol shipped from another state[8] due to the Commerce Clause.

In order to enable states to govern the sale and distribution of alcohol within their borders, Congress enacted the Wilson Act[9] and the Webb-Kenyon Act[10]. When these acts failed to give states the power to regulate the sale and distribution of alcohol, the Constitution was twice amended, first to absolutely prohibit the sale and distribution of alcohol and then to confer regulatory authority to the states. The provisions of Section 2 of the Twenty-First Amendment

---

modified to make the determination more objective, the statute and its progeny establish that the character of the owners of the licensee were subject to review and citizen involvement. This involvement is as much a part of the regulation of the sale of alcoholic beverages as distribution and licensing, matters that are clearly within the purview of the states.

[8] *Leisy v. Hardin*, 135 U.S. 100, 105 S. Ct. 681, 34 L.Ed. 128 (1890).

[9] 27 U.S.C. § 121

[10] 27 U.S.C. § 122

were clearly designed to give effect to the Congressional effort to make the Webb-Kenyon Act applicable at a constitutional level. States were given the power to regulate the sale and distribution of alcohol within their boundaries, unfettered by the restrictions of the Commerce Clause, particularly the Dormant Commerce Clause.

Where Congress fails to exercise its authority, however, the residual authority is either retained for the federal control (the Dormant Commerce Clause) or flows back to the states as part of their Tenth Amendment rights. When Congress did speak on the issues related to the distribution of alcohol, it opted for the latter course; it sought to confer regulatory authority to the states. When the Court struck down the ability of Congress to confer its authority to the states,[11] the Constitution was amended with the Eighteenth Amendment, making the importation, distribution and sale of alcohol constitutionally prohibited.

Here, therefore, it is no longer Congress that has spoken, it is the Constitution itself. Section 2 of the Twenty-First Amendment provides that "[t]he transportation or importation into any state, territory or possession of the United States for delivery or use thereon of intoxicating liquors in violation of the laws thereof, is hereby prohibited." With there being an express delegation of authority to regulate the sale of alcohol within a state, the Dormant Commerce Clause should be inapplicable.

---

[11] See, e.g. *Scott v. Donald*, 165 U.S. 58, 17 S. Ct. 265, 41 L.Ed. 632 (1897).

In 1933, upon enactment of the Twenty-First Amendment, the issue of whether the second section removed from Commerce Clause scrutiny state laws governing the importation and sale of alcohol was presented. Initially, the Court held that the amendment was dispositive on the supremacy of state regulation:

> "The words of Section 2 of the Twenty-First Amendment are apt to confer upon the state the power to forbit all importations which do not comply with the conditions which it prescribes."[12]

As the concurring opinion of Judge Hamilton in *Lebamoff Enterprises v. Huskey*, 666 F.3d 455, 463 (7th Cir. 2012) put it: "[T]he language in Section 2 of the Twenty-First Amendment has the unique effect of elevating the covered state laws and regulations to the status of federal constitutional law."

This position has gradually been curtailed by a number of cases which pitted state regulations governing alcohol and the provisions of federal law. For example, The Sherman Act was not protected from attack by the second section of the Twenty-First Amendment.[13]

---

[12] *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59 (1936).

[13] *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001); *United States v. Frankfort Distillers*, 324 U.S. 293 (1945); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 837. 63 L. Ed. 2d 233 (1980).

When squarely confronted with the trumping of the states' power preserved in Section 2 of the Twenty-First Amendment, in 1964, this Court struck down a number of state laws. *Hostetter v. Idlewild Bon Voyage Liquor Mart Corp.*[14] and *Dept. of Revenue v. Jones B. Beam Distilling Co.*[15] The Court found nothing in the Twenty-First Amendment that would read the constitutional amendment so broadly.

> "There can surely be no doubt . . . of Kentucky's plenary power to regulate and control . . . the distribution, use or consumption of intoxicants within her territory after they have been imported."[16]

But that apparently unfettered authority was limited.

There can be little doubt that, starting in 1964, the Webb-Kenyon authority found in Section 2 of the Twenty-First Amendment was gradually obliterated. The express provisions of a constitutional amendment were supplanted by Commerce Clause considerations, even where those Commerce Clause concerns had not been the subject of any expression by Congress.

This view of the power of the Dormant Commerce Clause has been embraced by several courts, reaching its zenith in *Granholm v. Heald*.[17]

---

[14] 377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 38 (1964).

[15] 377 U.S. 341, 84 S. Ct. 1247. 12 L. Ed. 2d 362 (1964).

[16] Id at 346, 1250.

[17] 544 U.S. 460, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005).

The Dormant Commerce Clause is, however, a court created extrapolation from Article 1 Section 8, holding that where Congress says nothing, the right of Congress to regulate interstate commerce trumps the ability of any state to regulate it. Where Congress is not only silent, but that authority has been constitutionally conferred to the states, the states should have that control.

If, however, this Court decides that the Dormant Commerce Clause still has vitality in matters relating to alcoholic beverages, such authority should be limited, recognizing that the regulation by the states is given specific approval in the Twenty-First Amendment.[18] In *Granholm v. Heald*, 544 U.S. 460, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005), the Court acknowledged that states are invested with substantial authority to regulate the sale, importation and distribution of alcoholic beverages. The Court has observed that states' adoption of the three-tier system is "unquestionably legitimate."[19] If so, the regulation of how alcohol is sold – the questions of who, how, when, where alcohol can be sold – is part of that three-tier system and is valid.

---

[18] See *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010) at 813.

[19] *North Dakota v. United States*, 495 U.S. 423, 110 S. Ct. 1986, 109 L. Ed. 2d 420 (1990).

II. If the Dormant Commerce Clause is applicable to the distribution of alcohol, notwithstanding the prohibition of Section 2 of the Twenty-First Amendment, the application of a residency requirement remains within the purview of state authority.

In cases which deal with the application of the Dormant Commerce Clause to the sale and distribution of alcoholic beverages, courts have held that state laws cannot discriminate against out of state liquor products or out of state liquor producers. Residency of its retailers or wholesalers does not deal with out of state products or producers. As noted by the Eighth Circuit, "It is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause . . . then we think States have flexibility to define the requisite degree of 'in-state' presence to include the in-state residence of wholesalers directors' and officers' and a super-majority of their shareholders."[20]

Although the *Southern Wine & Spirits of America, Inc.* case dealt with the residency of wholesalers, its reasoning is clearly applicable to retailers and other licensees.

Here, the state holds a legitimate interest in the residency of the owners of a licensee. Tennessee, like many states, approaches its regulation of the importation and sale of alcoholic beverages as an inherently local matter. Initially, the sale of wine and

---

[20] *Southern Wine & Spirits of America, Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013).

distilled spirits may only be affected in jurisdictions where the local voters have approved such sales.[21] It is a matter of significant importance that the determination of whether to sell alcohol is made by each separate community by a vote of the people.

The matter of local involvement is not limited to the question of whether or not such sales would be authorized in a given jurisdiction. Local communities are given deference as to the character and background of the actual owners of the proposed licensees, verifying the criminal background of the owners that are actually in charge of the retail license.[22] Every owner of a new application for a retail license is disclosed to the public on the TABC website and included on the TABC agenda.[23]

Tennessee requires local governments to provide a certificate of compliance to the Tennessee Alcoholic

---

[21] Local option election for package stores is governed by Tenn. Code Ann. §§ 57-3-102 and 57-3-106. Local option election for liquor-by-the-drink is governed by Tenn. Code Ann. § 57-4-103. Local option election for sales of wine in food stores is governed by Tenn. Code Ann. § 57-3-801.

[22] Some out-of-state owners may argue that as long as the manager of the store is a local resident, local control is maintained. See *Byrd v. Tennessee Wine and Spirits Retailers Association*, 883 F.3d 608 (6th Cir. 2018) at 625 through 626. This argument ignores the fact that it is the character, background and trustworthiness of the owners that will control the operations of the retail establishment.

[23] See, October 2018 Meeting Minutes available at: e.g., https://www.tn.gov/content/dam/tn/abc-documents/abc-documents/Oct2018_CM_MMRCM_MeetingMinutes.pdf

Beverage Commission.[24] The regulations of the Alcoholic Beverage Commission also require the public disclosure of the owners of a package store applicant, giving local communities the opportunity to be heard on the application.[25] The assumption of this regulation is, of course, that the members of the local community are in the best position to evaluate the character and good faith of the individuals that own the licensee. Superficially it may seem appropriate that limiting a store manager's residence could give the local community a similar opportunity to participate, but nothing in the regulations of the Alcoholic Beverage Commission or the state statutes provide a mechanism for community involvement in the licensing of a store manager. The lower courts assumption that the residency of a manager will suffice is a cynical mechanism by which citizens would be deprived of the opportunity to participate in the process.

This court has not had the opportunity to evaluate the constitutionality of state laws governing the residency of the businesses involved in the direct sale of alcohol to consumers. Underage drinking, excessive consumption, improper trade practices, and taxation are all matters that are core concerns of the Twenty-First Amendment. Residency facilitates the enforcement of these core concerns and is part of the "clearly valid" three-tier system.

---

[24] Tenn. Code Ann. § 57-3-208(b).

[25] See Tennessee Regulation 0100-03-.09. "Interested persons may personally or through counsel submit their views [on a retail application] in writing by the hearing date to be scheduled by the TABC."

Further, it cannot be ignored that agents – employees of the State of Tennessee – are required to investigate the operations of a licensee which could include examining the books and records maintained by its ownership. The state, by requiring owners of licensees to satisfy a two (2) year durational residency requirement, facilitates the ability of the TABC agent's task to satisfy this scrutiny. Surely the Dormant Commerce Clause does not require agents investigating owners to travel across country to conduct an initial investigation of a retail applicant.

Tennessee recognizes that the owner of an entity that owns a retail license may actually operate the licensed premises. See Tennessee Regulation 0100-03-.15(6). The Alcoholic Beverage Commission enforces the limit on the number of retail package store licenses that can be issued by the state. The interest in a package store license involves any interest including ownership, minority ownership, or control.[26] State law looks deeper than the managers of the licensee. State law is concerned with all interests in a package store licensee.

CONCLUSION

The Dormant Commerce Clause is a court created rule which does not find its source in the Constitution itself. As Justice Thomas noted in *Granholm*, "States require liquor to be shipped through in-state wholesalers because it is easier to regulate in-state

---

[26] See TABC Frequently Asked Questions available at www.tn.gov/abc/publicinformation-and-forms/frequently-asked-questions.html.

wholesalers and retailers. State officials can better enforce their regulations by inspecting the premises and attaching the property of in-state entities. . ." 544 U.S. at 517, 125 S. Ct. at 1921. Where owners are subject to the regulations of the Alcoholic Beverage Commission, similarly, requiring those owners to be residents of the state serves a legitimate state purpose. "Presence ensures accountability."[27]

To the extent that there is a Dormant Commerce Clause and it does apply to the sale and importation of alcohol, contrary to the express provisions of Section 2 of the Twenty-first Amendment, the state law is an integral part of the state's three-tier system, giving to the state the authority to regulate the licenses and entities that are directly authorized to sell and distribute alcohol, deference must be given to the state legislature rather than through a judicially created weighing involving minimal evidence. The WSWT supports the position of the Tennessee Wine and Spirits Retailers Association and the Attorney General of the State of Tennessee[28] in its argument that the durational residency requirement imposed by Tennessee law are a valid exercise of the core regulatory powers of Tennessee. The Sixth Circuit's holding to the contrary should be reversed.

---

[27] *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004). Reversed by *Granholm v. Heald*, 544 U.S. 460, 517, 125 S. Ct. 1885, 1921 (2005).

[28] See docket entry for November 13, 2018 – Letter of Clayton Byrd, Executive Director of the Tennessee Alcoholic Beverage Commission submitted, signed by the Tennessee Attorney General.

Respectfully submitted,

Henry E. Hildebrand, III
General Counsel
Counsel of Record
Wine and Spirit Wholesalers
of Tennessee, Inc.
150 Fourth Avenue, North
Suite 1820
Nashville, TN 37219
615-810-8777
hhildebrand@fpwlegal.com

Counsel for Amicus Curiae

No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR ILLINOIS, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

DAVID L. FRANKLIN*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
SARAH A. HUNGER
BRIDGET DIBATTISTA
BENJAMIN F. JACOBSON
Assistant Attorneys General

LISA MADIGAN
Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
dfranklin@atg.state.il.us

*Counsel of Record

QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Durational residency requirements for liquor retailers serve important state interests. 3

A. Durational residency requirements serve the core state interest of maintaining orderly liquor markets. 6

B. Durational residency requirements promote the state interest in accountability, oversight, and control. 14

C. Durational residency requirements serve the state interest in guaranteeing that alcohol retailers have a stake in the local community 20

II. States have adopted a wide variety of retail licensing systems, nearly all of which require residency. 22

III. Regardless of the validity of durational residency requirements, in-state presence requirements do not offend the dormant Commerce Clause. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009) ..... *passim*

Ass'n of Washington Spirits & Wine Distrib. v. Washington State Liquor Control Bd.,
340 P.3d 849 (Wash. 2015) 23

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 3, 6

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000) 9, 28

Brown Distrib. Co., Inc. v. Oklahoma Alcoholic Beverage Control Bd.,
597 P.2d 324 (Okla. 1979) 21

California Beer Wholesalers Ass'n, Inc. v. Alcoholic Bev.,
487 P. 2d 745 (Cal. 1971) 18

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 4

Clark Distilling Co. v. W. Maryland Ry. Co.,
242 U.S. 311 (1917) 10

Craig v. Boren,
429 U.S. 190 (1976) 19

Crowley v. Christensen,
137 U.S. 86 (1890) 4, 5

Dep't of Revenue v. James B. Beam Distilling Co.,
377 U.S. 341 (1964) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Dickerson v. Bailey,
336 F.3d 388 (5th Cir. 2003) 13

Ex parte Townsend,
144 S.W. 628 (Tex. Crim. App. 1911) 3

Francis v. Fitzpatrick,
30 A.2d 552 (Conn. 1943) 19

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

In re DLC Corp.,
712 A.2d 389 (Vt. 1998) 3

In re Metz Bros. Brewing Co.,
129 N.W. 443 (Neb. 1911) 12

Leisy v. Hardin,
35 U.S. 100 (1890) 8, 9, 21

Loretto Winery Ltd. v. Gazzara,
601 F. Supp. 850 (S.D.N.Y. 1985) 10, 11

Maxwell's Pic-Pac, Inc. v. Dehner,
739 F.3d 936 (6th Cir. 2014) 10, 13

Mette v. McGuckin,
25 N.W. 338 (Neb. 1885) 8

Myers v. Holshouser,
214 S.E.2d 630 (N.C. Ct. App. 1975) 15

Nat'l Distrib. Co., Inc. v. U.S. Treasury Dep't, Bureau of Alcohol, Tobacco & Firearms,
626 F.2d 997 (D.C. Cir. 1980) 11

TABLE OF AUTHORITIES—Continued

Page(s)

North Dakota v. United States,
495 U.S. 423 (1990) ..... *passim*

Pennsylvania State Police Bureau of Liquor Control Enf't v. Progress Fire Co. Home Ass'n,
55 A.3d 1270 (Pa. Commw. Ct. 2012) 17

PR Pub. LLC v. Iowa Alcoholic Beverages Div.,
847 N.W.2d 613 (Iowa Ct. App. 2014) 20

Retail Liquor Ass'n of Oklahoma v. Oklahoma Alcoholic Beverage Laws Enf't Comm'n,
276 F. Supp. 3d 1230 (W.D. Okla. 2017) 14

Rhodes v. Iowa,
170 U.S. 412 (1898) 10

Schwegmann Giant Super Markets v. Edwards,
552 So. 2d 1241 (La. Ct. App. 1989) 18

S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 19, 22

State v. Adams,
6 N.H. 532 (N.H. 1834) 7

State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936) 6, 7, 11

State ex rel. Nixon v. Beer Nuts, Ltd.,
29 S.W.3d 828 (Mo. Ct. App. 2000) 16, 17

Vance v. W.A. Vandercook Co.,
170 U.S. 438 (1898) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Welsh v. State,
25 N.E. 883 (Ind. 1890) 8

Wine Country Gift Baskets.com v. Steen,
612 F.3d 809 (5th Cir. 2010) 28

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 13

Constitutional Authorities:

U.S. Const., amend. XXI, § 2 ..... *passim*

Mich. Const. art. IV, § 40 5

Ok. Const. art. XXVIII-A 5, 26

Or. Const. art. I, § 39 5

S.C. Const. art. VIII-A 5

Statutory Authorities:

Webb-Kenyon Act, 27 U.S.C. § 122 10

Wilson Act, 27 U.S.C. § 121 ..... 8, 10

27 U.S.C. § 203(b), (c) 15

Ariz. Rev. Stat. Ann. § 4-202(A) 25

Ark. Code Ann. § 3-5-215 25

Cal. Bus. & Prof. Code § 23961(c) 24

3 Colo. Stat. Ann., ch. 89, § 4(a) (1935) 11

Conn. Gen. Stat. Ann. §§ 30-20, 30-36 26

Ga. Code Ann. § 3-4-23(a) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Ga. Code. Ann. §§ 3-5-40, 3-6-40. 26

Ill. Rev. Stat., ch. 43 § 120 (Smith-Hurd 1937) 11

235 ILCS 5/5-1(d) 25, 27

235 ILCS 5/6-2 ..... 25, 27

235 ILCS 5/7-1(6) 25

235 ILCS 5/7-14 ..... 25, 27

Ind. Code § 7.1-3-1-1.5(a)–(b) 26

Ind. Code § 7.1-3-1-14 16

Ind. Code. §§ 7.1-3-21-3, 7.1-3-21-5 24

Ind. Code § 7.1-5-10-15 16

Ind. Stat. Ann. § 3730(c) (1934) 11

Iowa Code Ann. §§ 123.22, 123.24 23

Kan. Stat. Ann. § 41-311(b) 24, 26

Ky. Rev. Stat. Ann. § 243.100(1)(f) 24, 25, 27

Ky. Rev. Stat. Ann. § 243.230 ..... 25, 27

La. Stat. Ann. § 26:80(A)(2) 24

4B Ann. Laws of Mass., ch. 138, §§ 18, 18A (1965) 11

Mass. Gen. Laws Ann. ch. 135, § 15 25

1 Md. Ann. Code, Art. 2B, § 13 (1939) 11

Md. Code Alco. Bev. § 1-201 26

Md. Code Alco. Bev. § 4-109 24

TABLE OF AUTHORITIES—Continued

Page(s)

Me. Rev. Stat. Ann. tit. 28-A § 1201(5)(B) 25

5 Comp. Laws Mich. § 9209–32 (Supp. 1935) 11

Miss. Code Ann. § 67-3-19(a) 25

Mo. Rev. Stat. § 311.015 14

Mo. Rev. Stat. § 311.060(1) 25

1 Mo. Rev. Stat. § 4906 (1939) 11

Mont. Code Ann. § 16-1-101(3) 14, 24

Mont. Code Ann. §§ 16-1-106(2), 16-1-303(2) 24

N.C. Code Ann. § 3411(103) ($1^{1/2}$) (1939) 12

N.C. Gen. Stat. Ann. § 18B-900 25

1 N.D. Rev. Code § 5-0202 (1943) 12

Neb. Comp. Stat., ch. 53, Art. 3, §§ 53-317, 53-328 (1929 and Cum. Supp. 1935) 11

Neb. Rev. Stat. Ann. §§ 53-125(1), (3) 25

Neb. Rev. Stat. Ann. § 53-131(2) 21

1 Nev. Comp. Laws § 3690.05 (Supp. 1931-1941) 11

N.H. Rev. Stat. Ann. § 177 23

2 Rev. Stat. of N.J. § 33:1–25 (1937) 12

N.Y. Alco. Bev. Cont. Law § 2 22

N.Y. Alco. Bev. Cont. Law § 64(6-a) 21

N.Y. Alco. Bev. Cont. Law § 101(1) 18

N.Y. Alco. Bev. Cont. Law § 106(13) 18

TABLE OF AUTHORITIES—Continued

Page(s)

N.Y. Alco. Bev. Cont. Law § 110-b 21

N.Y. City Charter ch. 70 § 2800(a) 21

Ohio Code Ann. § 6064-17 (1936) 12

Okla. Stat. tit. 37A, § 2-146 24

47 Pa. Cons. Stat. § 3-301 24

47 Pa. Cons. Stat. § 4-403 ..... 24, 25, 27

47 Pa. Cons. Stat. § 5-511 ..... 25, 27

R.I. Gen. Laws Ann. § 3-5-10(a)(1) 25

R.I. Gen. Laws Ann. § 3-5-11(a) 26

R.I. Gen. Laws, ch. 123 § 2 (1909) 10

R.I. Gen. Laws, ch. 163, § 4 (1938) 12

S.C. Code Ann. § 61-2-90 24

S.C. Code Ann. §§ 61-6-130, 6-6-141. 26

1 S.D. Code § 5.0204 (1939) 12

Tenn. Code § 57-3-204(b)(2)(A) 24

Tenn. Code § 57-3-204(b)(4) 15, 16

Texas Liquor Control Act, ch. 467, § 18, 1935 Tex. Laws 2d Called Sess. 1814 12

Tex. Rev. Civ. Stat., art. 7446 (1911) 10

Utah Code Ann. §§ 32B-2-202, 32B-2-501 23

Va. Code Ann. §§ 4.1-119, 207-08 23

Va. Code Ann. § 4.1-203(A) 25, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Va. Code Ann. § 4.1-222(B) 24, 25, 27

Vt. Rev. Stat., Tit. 28, ch. 271, § 6156 (1947) 12

Wash. Rev. Code Ann. § 66.24.010(2)(a) 24

8 Rev. Stat. Wash. §§ 7306-23G, 7306-27(Supp. 1940) 12

Wis. Stat. Ann. § 125.04(5)(a) 24, 25, 27

Wis. Stat. § 176.05(9) (1937) 12

Wyo. Rev. Stat. Ann. § 59-104 (Supp. 1940) 12

Wyo. Stat. Ann. §§ 12-1-101(a), 12-4-103 24

Other Authorities:

49 Cong. Rec. 699-700 (1912) 9

49 Cong. Rec. 761 (1912) 10

H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935) 11

90th Ill. Gen. Assem., House of Rep. Proceedings, Mar. 25, 1998 16

95th Ill. Gen. Assem., Senate Proceedings, Aug. 7, 2007 15

Alcohol & Tobacco Tax & Trade Bureau, Alcohol Dealer Registration Form 15

Centers for Disease Control and Prevention, Excessive Alcohol Use: A Drain on the American Economy 4

TABLE OF AUTHORITIES—Continued

Page(s)

City of Chicago, Dep't of Hous. & Econ. Dev., Landmark Designation Report, (Former) Schlitz Brewery-Tied House at 11 (Feb. 3, 2011)..... 12, 13

Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* (The Center for Alcohol Policy 2011) (1933) 12, 13, 23

Nat'l Alcohol Beverage Control Ass'n, Control State Directory and Info..... 23

Megan Noe, *New Law Cracking Down on Modern-day Bootlegging*, WQAD8, (Dec. 13, 2016, 7:58 PM)..... 17

Operation Swill: TGI Fridays Fined $500,000 for Switching Booze, The Post Standard (Jul. 31, 2013)..... 17, 18

Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon Act*, 4 VA. L. REV. 353 (1917)..... 9

Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor*, 79 CALIF. L. REV. 161 (1991)..... 3, 11

INTEREST OF AMICI CURIAE

Illinois, 34 States, and the District of Columbia submit this brief in support of Petitioner to urge reversal of the judgment of the court of appeals, which held that Tennessee's statutory durational residency requirement for retail alcohol licensees violated the dormant Commerce Clause.

All of the Amici States have enacted statutes that regulate the manufacture, distribution, and sale of alcohol within their borders. Some of them impose durational residency requirements on alcohol retailers, some do not impose residency requirements but do require that retailers have a physical presence in the State, and some assume monopolistic control over the in-state liquor market. But all of the Amici States recognize the need to exercise their Twenty-first Amendment authority to regulate the liquor market. These States realize that excessive alcohol consumption poses great risks to local health and safety and that the liquor market is uniquely susceptible to infiltration by criminal elements. Therefore, it is vital to the Amici States to have the authority to regulate the manufacture, distribution, and sale of alcohol within their borders, and the discretion to adapt their regulatory regimes to their particular needs.

SUMMARY OF ARGUMENT

As explained in Petitioner's opening brief, Tennessee's durational residency requirement for retail alcohol licenses does not violate the dormant Commerce Clause. This brief focuses on the important interests that are served by States' regulation of the manufacture, distribution, and sale of alcohol within their borders. States have long recognized the dangers associated with the liquor market, and the text of the Twenty-first Amendment guarantees them broad authority to regulate "the delivery or use" of alcohol to prevent those harms.

Contrary to the Sixth Circuit's decision, the States' need to regulate this market is not driven by economic protectionism. Instead, States have an interest in ensuring an orderly liquor market to avoid the evils that were brought about by the pre-Prohibition practice of tied houses and the Prohibition-era infiltration of the liquor market by organized crime. States also have an interest in enforcing their liquor laws, inspecting premises and records, and holding retailers accountable for violation of state laws that are designed to protect the public health and safety. And States have an interest in promoting a system in which alcohol retailers have a connection to the local communities they serve and an understanding of those communities' needs.

Durational residency requirements such as Tennessee's serve all of these interests by preventing absentee ownership of alcohol retail premises. Absentee owners have a lesser investment in the community than residents; States cannot effectively oversee absentee owners to ensure compliance with state

laws; and absentee owners are less likely to be held accountable for violating a State's laws.

For the past 85 years, States have exercised their Twenty-first Amendment power to adopt and adapt regulatory regimes to control the retail liquor market within their borders. The breadth and variety of state responses to the risks endemic to the liquor market illustrate the need for broad discretion to regulate the retail sale of alcohol.

ARGUMENT

I. Durational residency requirements for liquor retailers serve important state interests.

States both before and after Prohibition have recognized the many ways in which alcohol presents a "potential danger to the community's safety and general welfare." *In re DLC Corp.*, 712 A.2d 389, 392 (Vt. 1998); *see also, e.g.*, *Ex parte Townsend*, 144 S.W. 628, 631 (Tex. Crim. App. 1911) ("[T]he use of intoxicating liquors is well nigh universally acknowledged to be injurious to the health, morals, and safety of the people . . . ."). When the nation chose to repeal the Eighteenth Amendment, it acknowledged that Prohibition's attempt to devise a one-size-fits-all federal response to that danger had been a failure. *See* Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor*, 79 CALIF. L. REV. 161, 162 (1991). In lieu of that flawed federal response, the drafters and ratifiers of the Twenty-first Amendment aimed to more effectively "promote temperance," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (internal quotation marks omitted), by returning to the States the authority to

control the sale and consumption of alcohol, U.S. Const., amend. XXI, § 2.

The issue has always been one that the States are best positioned to understand and address, for excessive alcohol consumption occurs locally, and its costs—including increased criminal enforcement expenses, lost workplace productivity, and higher healthcare spending—are borne in significant part by state and local governments.[1] And States are on the front lines in combating the many ways in which the liquor market has attracted criminal activity, from impurities added to illegally distilled spirits to organized crime's involvement in channels of distribution. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 198 (2d Cir. 2009) (Calabresi, J., concurring).

For these reasons, the manufacture, distribution, and sale of alcohol within a State are matters of paramount local concern. Accordingly, for well over a century, States have extensively regulated the provision of alcohol to their residents, first under their inherent police power to protect the health, safety, and morals of their citizens, and then under the extended authority conferred on them by the Wilson Act, the Webb-Kenyon Act, and section 2 of the Twenty-first Amendment. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) (recognizing States' core powers under the Twenty-first Amendment "to regulate the sale and use of liquor within [state] borders"); *Crowley v. Christensen*, 137 U.S. 86,

---

[1] Centers for Disease Control and Prevention, Excessive Alcohol Use: A Drain on the American Economy, https://www.cdc.gov/alcohol/onlinemedia/infographics/excessive-alcohol-economy.html.

91 (1890) (recognizing States have a long tradition of regulating alcohol through police power). Indeed, the concern is so great that some States expressly grant their legislatures the power to regulate the liquor market in their state constitutions. *See, e.g.*, Mich. Const. art. IV, § 40; Ok. Const. art. XXVIII-A; Or. Const. art. I, § 39; S.C. Const. art. VIII-A.

States have used these powers to craft solutions tailored to their individual circumstances. Unsurprisingly, those solutions vary significantly from State to State, but there are patterns: since the end of Prohibition, the States have generally adopted one of two models. The so-called control States have assumed monopolistic control over the distribution and retail sale of alcohol. Other States have adopted a three-tier system that separates the layers of the alcohol market and places separate licensing requirements on manufacturers, distributors or wholesalers, and retailers. *See Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (recognizing the three-tier system as "unquestionably legitimate")).

The retail tier at issue in this case is comprised of both on-premises retail establishments, such as bars or taverns, and off-premises retail establishments where the alcohol is not consumed on-site, such as traditional liquor stores. This tier is the final link in the chain between the producer and the end consumer. As the remainder of this Section will show, regulation of the retail tier is closely tied to the States' interest in addressing the unique challenges posed by alcohol consumption.

A. Durational residency requirements serve the core state interest of maintaining orderly liquor markets.

States have an interest in promoting orderly liquor markets, *see North Dakota*, 495 U.S. at 432 (plurality op.), so that they can track the flow of alcohol from producer to consumer and facilitate the sale of lawful and safe goods, free from the influence of organized crime or other illegal interests.

The promotion of orderly liquor markets has long been identified as a core purpose of section 2 of the Twenty-first Amendment. *Id.* at 432, 440; *Arnold's Wines, Inc.*, 571 F.3d at 188 ("The purpose of section 2 was to protect certain core interests of the states in 'promoting temperance, ensuring orderly market conditions, and raising revenue' through regulation of the production and distribution of alcoholic beverages." (quoting *North Dakota*, 495 U.S. at 432)). Core interests under section 2 are treated "with particular care" and granted additional deference. *North Dakota*, 495 U.S. at 432, 440; *see also Bacchus*, 468 U.S. at 276 ("State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.").

To facilitate orderly markets, many States have established comprehensive three-tier regulatory systems. *North Dakota*, 495 U.S. at 432. This type of system "serve[s] to channelize the traffic in liquor and thus to prevent diversion of that traffic into unauthorized channels." *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345 (1964); *see also State Bd. of Equalization of Cal. v. Young's Market*

Co., 299 U.S. 59, 63 (1936), *abrogated on other grounds by Granholm*, 544 U.S. at 485 (retailer licensing fees "serve as an aid in policing the liquor traffic"). Within this system, the retail tier is crucial because retailers "form the final link in the distribution chain." Pet. App. 50a (Sutton, J., dissenting). As the final link, retailers assure that the goods sold to consumers are safe and legal, and that they have been distributed from manufacturer to consumer in accordance with state law.

It is reasonable for States to conclude that absentee ownership of alcohol retailers harms the interest in maintaining orderly liquor markets. Durational residency requirements aim to ensure that retailers remain accountable to state or local interests by being accessible to regulators and courts. Unlike residents, absentee liquor retailers with no meaningful connection to the State may not share the State's interest in maintaining an orderly market. Nor are States and local governments able to hold non-resident retailers to account to the same extent as resident retailers, as it is simply not possible for state regulators to traverse the country inspecting retailers or speaking to far-flung owners. Without effective State oversight of retail sales, States cannot, for example, ensure that organized crime or other unscrupulous interests are kept out of the liquor markets.

Residency and presence requirements are not new; requiring retailers to reside in-state or to maintain an in-state presence is a practice that long predates Prohibition. *See, e.g.*, *State v. Adams*, 6 N.H. 532, 533 (N.H. 1834) (requiring "licensed houses" to obtain a "license, in writing, from the selectmen of the town or place where such person resides" or, if no selectmen

are available, from the court of Common Pleas "to exercise the business of a taverner"). In the 1880s, for example, Nebraska imposed a residency requirement on retailers, and Indiana followed suit soon afterward. *See Mette v. McGuckin*, 25 N.W. 338 (Neb. 1885); *Welsh v. State*, 25 N.E. 883 (Ind. 1890).

These requirements were widely understood to be constitutional at the time. As the Indiana Supreme Court explained in a contemporaneous decision, "[i]t is not an unreasonable requirement that a person who desires to avail himself of a license to retail intoxicating liquor shall submit himself to the jurisdiction of the state, by becoming an inhabitant thereof." *Welsh*, 25 N.E. at 885; *see also Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 451–52 (1898) (positing that a residency requirement would be lawful so long as the resident retailers did not "discriminate against the persons or places from where or from whom they did not buy").

Residency requirements were of limited utility in ensuring orderly markets, however, until Congress granted States the authority to regulate liquor that had been shipped in interstate commerce. Without the protections of the Twenty-first Amendment, liquor was treated largely the same as any other good in interstate commerce. *See Leisy v. Hardin*, 135 U.S. 100, 121–23 (1890), *superseded by statute*, Wilson Act, 27 U.S.C. § 121, *as recognized in Granholm*, 544 U.S. at 478. Accordingly, the interstate distribution of liquor in original packages could not be limited by the States without express congressional authority. *See id.* at 119 ("[W]here the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the

importation of goods from one state into another, congress can alone act upon it, and provide the needed regulations.").

In practical terms, this meant that States with durational residency statutes could not prohibit or regulate sales of liquor in its original package by nonresident liquor retailers to their resident consumers. *See id.* at 122–23; *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000) ("[T]o enforce these laws states had to deal with liquor arriving from other states and nations—and their ability to do so was regularly defeated by decisions invoking the commerce clause."). This state of affairs caused many problems, as States were forced to allow out-of-state liquor shipments to enter their territory, without any ability to verify their provenance, ensure their safety, or otherwise maintain an orderly market. *See, e.g.*, Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon Act*, 4 VA. L. REV. 353, 364 (1917). By 1912, it was estimated that approximately 20 million gallons of liquor were shipped in interstate commerce to dry States. *See* 49 Cong. Rec. 699–700 (1912) (statement of Sen. Sanders). To take one example, out-of-state retailers would ship jugs of liquor to express offices in Iowa with no deliverable address. Rogers, *Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon* Act, 4 VA. L. REV. at 364–65. Without a delivery address, the liquor would remain in the express office until it was retailed "to whomever would pay the case charges, the value of the liquor, and the cost of transportation." *Ibid.* As a result of these "daily trainloads of liquors in bottles, jugs, and other packages," the express offices were "converted into the most extensive and active whisky

shops, from which whisky [was] openly distributed in great quantities." 49 Cong. Rec. 761 (1912) (statement of Sen. Kenyon).

The problems that arose during this period led to the passage of the Wilson Act in 1890 and the Webb-Kenyon Act in 1913, both of which were designed to improve the States' ability to control and regulate their liquor markets. *See* 27 U.S.C. §§ 121–22. The Wilson Act granted States the power to regulate "the resale of imported liquor," and the Webb-Kenyon Act enabled States to "forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms." *Granholm*, 544 U.S. at 480–81 (citing *Rhodes v. Iowa*, 170 U.S. 412, 421 (1898); *Clark Distilling Co. v. W. Maryland Ry. Co.*, 242 U.S. 311 (1917)). As their authority to regulate expanded, more States implemented residency requirements. *See, e.g.*, R.I. Gen. Laws, ch. 123 § 2 (1909); Tex. Rev. Civ. Stat., art. 7446 (1911).

All of these state regulatory schemes were cast aside during Prohibition, which "bred a new kind of lawlessness" dominated by "a violent and unruly organized crime industry." *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 938–39 (6th Cir. 2014). Worse yet, this lawlessness remained largely unchecked, because the Eighteenth Amendment "gave concurrent enforcement powers to state and federal authorities," and "[e]verybody's business soon became nobody's responsibility." *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 856 (S.D.N.Y. 1985). "The state and local officials had more important work to do than enforce this unpopular law," and the federal government removed these "cases from the regular federal

law enforcement agencies and entrusted the work to special agents," who were underpaid and easily corrupted. *Ibid.*; *see also* Spaeth, *Twenty-first Amendment and State Control*, 79 CALIF. L. REV. at 162.

In the wake of Prohibition's failure, the States' regulatory authority was reinstated and further solidified by the ratification of the Twenty-first Amendment, which was "adopted with 'unexpected speed.'" *Nat'l Distrib. Co., Inc. v. U.S. Treasury Dep't, Bureau of Alcohol, Tobacco & Firearms*, 626 F.2d 997, 1004 (D.C. Cir. 1980) (quoting H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935)). At the time of ratification and shortly thereafter, both the States and this Court understood the States' ability to regulate the distribution and sale of liquor to be nearly limitless. *Granholm*, 544 U.S. at 485–86; *see also, e.g., Young's Market Co.*, 299 U.S. at 62. Some States banned liquor altogether, but the States that allowed liquor sales either implemented a three-tier system or opted to become control States. *See Granholm*, 544 U.S. at 517 (Thomas, J., dissenting). Of the three-tier States, at least 18 imposed a form of residency requirements in the years following ratification. *See id.* at 518 n.6 (Thomas, J., dissenting).[2]

---

[2] 3 Colo. Stat. Ann., ch. 89, § 4(a) (1935) (residency requirement); Ill. Rev. Stat., ch. 43 § 120 (Smith-Hurd 1937) (residency requirement); Ind. Stat. Ann. § 3730(c) (1934) (residency requirement); 1 Md. Ann. Code, Art. 2B, § 13 (1939) (residency requirement); 4B Ann. Laws of Mass., ch. 138, §§ 18, 18A (1965) (residency requirements); 5 Comp. Laws Mich. § 9209–32 (Supp. 1935) (residency requirement); 1 Mo. Rev. Stat. § 4906 (1939) (citizenship requirement); Neb. Comp. Stat., ch. 53, Art. 3, §§ 53-317, 53-328 (1929 and Cum. Supp. 1935) (residency and physical presence requirement); 1 Nev. Comp. Laws § 3690.05 (Supp.

One primary reason that States chose to implement residency requirements following the repeal of Prohibition was the failed experiment of "tied houses" in the late nineteenth century. *See* Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control*, ch. 4 (The Center for Alcohol Policy 2011) (1933); *In re Metz Bros. Brewing Co.*, 129 N.W. 443, 443–44 (Neb. 1911) (describing 1907 law prohibiting manufacturers from "becom[ing] interested directly or indirectly in any retail license for the sale of intoxicating or malt liquors"). Tied houses, which flourished in the late 1800s, were "establishments under contract to sell exclusively the product of one manufacturer." Fosdick & Scott, *Toward Liquor Control*, ch. 4; *see also* City of Chicago, Dep't of Hous. & Econ. Dev., Landmark Designation Report, (Former) Schlitz Brewery-Tied House at 11 (Feb. 3, 2011), https://tinyurl.com/yaj5w3qs.

Although the tied house system was initially lauded as an innovation, it later became clear that it revealed

---

1931-1941) (residency and physical presence requirements); 2 Rev. Stat. of N.J. § 33:1–25 (1937) (citizenship and residency requirements); N.C. Code Ann. § 3411(103)(1½) (1939) (residency requirement); 1 N.D. Rev. Code § 5-0202 (1943) (citizenship and residency requirements); Ohio Code Ann. § 6064-17 (1936) (residency and physical presence requirements); R.I. Gen. Laws, ch. 163, § 4 (1938) (residency requirement); 1 S.D. Code § 5.0204 (1939) (residency requirement); Texas Liquor Control Act, ch. 467, § 18, 1935 Tex. Laws 2d Called Sess. 1814 (residency requirement); Vt. Rev. Stat., Tit. 28, ch. 271, § 6156 (1947) (residency requirement); 8 Rev. Stat. Wash. §§ 7306-23G, 7306-27 (Supp. 1940) (physical presence, citizenship, and residency requirement); Wis. Stat. § 176.05(9) (1937) (citizenship and residency requirements); Wyo. Rev. Stat. Ann. § 59-104 (Supp. 1940) (citizenship and residency requirements).

"all the vices of absentee ownership." Fosdick & Scott, *Toward Liquor Control*, ch. 4. Manufacturers, who largely resided out of state, "knew nothing and cared nothing about the community," and were also "beyond local social influence." *Ibid.*; *see also* Landmark Designation Report at 21 (out-of-state breweries were nonresponsive to local complaints and were "regarded as giant and soulless monopolies"). In Chicago, for example, "the tied-house system created multiple saloons" in locations where there had been a single saloon before, with each new saloon "selling only one brand of beer." Landmark Designation Report at 20. As a result, "the lack of job security and increased competition between the ever-growing number of saloons forced some saloon keepers to host vice on their premises in exchange for kickbacks." *Ibid.*; *Maxwell's Pic-Pac, Inc.*, 739 F.3d at 938–39 (during this era, the "free market for alcohol in the United States begot political corruption, prostitution, gambling, crime, and poverty" as "[n]ational manufacturers built saloons near factories to attract workers, saturating neighborhoods with alcohol suppliers").

The tied system was further "believed to enable organized crime to dominate the industry." *Arnold's Wines, Inc.*, 571 F.3d at 187. Preventing "organized crime from (re)gaining control of the alcohol industry" was a "core concern" of section 2 of the Twenty-first Amendment. *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003); *see North Dakota*, 495 U.S. at 426 (describing the "interest in preventing the diversion of liquor"); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939), *abrogated by Granholm*, 544 U.S. at 485 (describing a statute that "declare[d] whiskey re-

moved from permitted channels contraband subject to immediate seizure," to address the problem of unlawful manufacture and illicit distribution, among others). The tied house experience, in short, shows that state efforts to combat absentee ownership were grounded in history and lived experience, not economic protectionism.

But while the interest in an orderly liquor market is rooted in the lessons of history, it is not merely a historical relic. Oklahoma, for example, overhauled its alcohol laws in a popular referendum in 2016, which retained and adjusted a durational residency requirement for spirits retailers. *See Retail Liquor Ass'n of Oklahoma v. Oklahoma Alcoholic Beverage Laws Enf't Comm'n*, 276 F. Supp. 3d 1230, 1233–34 (W.D. Okla. 2017); *see also, e.g.*, Mo. Rev. Stat. § 311.015 (purpose clause enacted in 2007 asserts that "[t]he provisions of this chapter establish vital state regulation of the sale and distribution of alcohol beverages in order to . . . achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers"); Mont. Code Ann. § 16-1-101(3) (declaration of policy amended in 2009 to state that "[t]he overall purposes . . . are to promote temperance, create orderly markets, and aid in the collection of taxes").

B. Durational residency requirements promote the state interest in accountability, oversight, and control.

Reinforcing their broad interest in structuring orderly liquor markets, States also have an acute practical interest in maintaining accountability, oversight,

and control over the retail sale of alcohol. *See* Tenn. Code § 57-3-204(b)(4) ("[I]t is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises."); *Myers v. Holshouser*, 214 S.E.2d 630, 634 (N.C. Ct. App. 1975) ("There is a peculiar need for an administrative body to provide close surveillance and regulation of the liquor industry because of the numerous and complex problems that arise . . . .").

The States' ability to monitor retail sales is critical because, unlike for producers and manufacturers, *see Granholm*, 544 U.S. at 490, there is no meaningful federal regulatory backstop at the retailer tier. *See, e.g.*, 95th Ill. Gen. Assem., Senate Proceedings, Aug. 7, 2007, at 4 (statement of Sen. Silverstein) (noting that in addition to purchasing from wholesalers that are not licensed in Illinois, out-of-state retailers "are not subject to federal regulation"). Although the Federal Alcohol Administration Act of 1935 requires permits for importers, wholesalers, and producers, it does not require them for retailers. *See* 27 U.S.C. § 203(b), (c) (governing production of wine, distilling of spirits, and wholesaling). The previous special tax for retailers was repealed a decade ago, and retailers now are only required to register with the Alcohol and Tobacco Trade and Tax Bureau. *See* Alcohol & Tobacco Tax & Trade Bureau, Alcohol Dealer Registration Form, https://tinyurl.com/ycrtwyac. The federal government has thus ceded this regulatory responsibility to the States, which are in any event better positioned to oversee the final link in the distribution chain and the actual sale of liquor to their residents.

States' comprehensive regulation of the retail sale of liquor takes several forms. First, and most fundamental, States regulate and monitor how sales are made to consumers. *See Arnold's Wines*, 571 F.3d at 188. Under their respective state schemes, retailers may sell only to individuals who are qualified to purchase alcohol, during the time allotted, and in the manner dictated by statute. Preventing the sale of alcoholic beverages to underage persons, for example, is a time-consuming but imperative endeavor for state regulators. *See State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 838 (Mo. Ct. App. 2000); 90th Ill. Gen. Assem., House of Rep. Proceedings, Mar. 25, 1998, at 143 (statement of Rep. Hoffman) (States seek to "have some kind of control over [the retailer] to ensure that [it] is actually selling it to a person who is 21 years of age or older"). Retailers must also restrict their sales to the hours allowed for dispensation, *see, e.g.*, Ind. Code § 7.1-3-1-14, and to those who are not already intoxicated, *see id.* § 7.1-5-10-15.

Second, States inspect retailers' premises, books, and records to ensure compliance with their laws. *See Arnold's Wines*, 571 F.3d at 188; Tenn. Code § 57-3-204(b)(4) (legislative statement of intent that "the commission is authorized and instructed to prescribe such inspection, reporting, and educational programs as it shall deem necessary or appropriate to ensure the laws, rules, and regulations governing such licenses are observed"). In New York, for example, the "State Liquor Authority may inspect any premises where alcoholic beverages are manufactured, stored, or sold, as well as the books and records kept on such premises." *Arnold's Wines*, 571 F.3d at 188. And in Missouri, inspections may include not only books and

records, but also the alcohol being sold to the retailer's consumers. When an out-of-state retailer attempted to sell products to Missouri residents, a Missouri court upheld the fine and injunction against it, explaining that "[a] primary purpose of Missouri's licensing requirements for those who sell alcoholic beverages is to provide the Division with a concrete method for inspecting, testing and approving beers before they are offered for sale in Missouri" to ensure that they are safe and sold only to those who are of age. *Beer Nuts, Ltd.*, 29 S.W.3d at 838; *see also Pennsylvania State Police Bureau of Liquor Control Enf't v. Progress Fire Co. Home Ass'n*, 55 A.3d 1270, 1274 (Pa. Commw. Ct. 2012) (state agency authorized to "enter a licensed premises without a warrant to conduct a full routine inspection" and then to "issue citations for any violations" of "any laws of this Commonwealth relating to liquor").

Similarly, Illinois recently increased the penalties for retailers seeking to bypass the three-tier system by purchasing alcohol from neighboring States. *See* Megan Noe, *New Law Cracking Down on Modern-day Bootlegging*, WQAD8 (Dec. 13, 2016, 7:58 PM), https://wqad.com/2016/12/13/new-law-cracking-down-on-modern-day-bootlegging/. The ability to inspect retailers' premises is essential for enforcement of these rules. And the ability to test the alcohol served at on-premises retailers was critical to the success of a 2013 operation by New Jersey's liquor regulators dubbed "Operation Swill." *See Operation Swill: TGI Fridays Fined $500,000 for Switching Booze*, The Post Standard (Jul. 31, 2013), https://tinyurl.com/yap82vzt. Operation Swill uncovered that more than two dozen establishments were passing off and serving cheap

alcohol, rubbing alcohol, or dirty water to customers as premium liquor brands. *Ibid.*

Third, States oversee the financial relationships among the various levels of the three-tier system. *See Arnold's Wines*, 571 F.3d at 188; *California Beer Wholesalers Ass'n, Inc. v. Alcoholic Bev.*, 487 P. 2d 745, 748 (Cal. 1971). As discussed *supra* Section I.A., many States implemented three-tier systems after ratification of the Twenty-first Amendment to better regulate liquor distribution. Those States must be able to oversee the financial relationships among the tiers, with an eye toward preventing vertical integration and the re-emergence of a tied house arrangement. *See Schwegmann Giant Super Markets v. Edwards*, 552 So. 2d 1241, 1246–47 (La. Ct. App. 1989) (describing how the "evils" of the tied house system could come to pass again if, for example, one of the monopolistic breweries sought to "use credit and other anticompetitive tools to exclude competitors from retail outlets"). Accordingly, New York's laws, for instance, explicitly prohibit return to a tied house system by preventing vertical integration and otherwise regulating the gifts or services that may be exchanged between the tiers. *See* N.Y. Alco. Bev. Cont. Law §§ 101(1)(a), (c), 106(13). State oversight of these relationships also benefits smaller retailers by alleviating any improper "pressures exerted by larger manufacturing or wholesale interests" attempting to "dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques." *California Beer Wholesalers Ass'n, Inc.*, 487 P. 2d at 748 (internal citation omitted).

When actual or threatened violations occur on any of these matters, States must be able to engage in effective enforcement, which is far easier when the owners live in the State. *See Granholm*, 544 U.S. at 523 (Thomas, J., dissenting) ("presence ensures accountability") (internal quotation marks and alterations omitted); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013) ("The legislature logically could conclude that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts."). This connection between residency and the state interest in effective oversight has been recognized since the early days of the three-tier system. *See, e.g.*, *Francis v. Fitzpatrick*, 30 A.2d 552, 555 (Conn. 1943) ("The beneficial effect of the statute as related to the requirements concerning residence . . . is likewise apparent, in view of the probable aid to supervision and control afforded thereby.").

These same principles apply equally to pre-enforcement matters, where a simple conversation between the regulator and an in-state resident could prevent violations from arising. And nowhere is prompt and vigorous enforcement more important than at the retail tier, which is responsible for the safe and orderly dispensation of alcohol to consumers. *See Craig v. Boren*, 429 U.S. 190, 215 (1976) (Stewart, J., concurring) (noting a State's undisputed "broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders").

C. Durational residency requirements serve the state interest in guaranteeing that alcohol retailers have a stake in the local community.

States also have an interest in ensuring that alcohol purveyors are known by the community and have a demonstrated stake in that community's well-being. *See* Pet. App. 50a–51a (Sutton, J., dissenting). This interest is related to the core state interest of promoting temperance, an interest that is best addressed at the state and local level. *See Arnold's Wines, Inc.*, 571 F.3d at 188. It is owners who make the important managerial decisions that have the potential to affect the public health, and it is owners who must be eventually held liable if those decisions go wrong. An absentee owner without a relationship to the local community is less likely to be invested in the community's well-being. As Judge Sutton put it, "[t]he only way to know a community is to live there." Pet. App. 50a (Sutton, J., dissenting).

States have employed many techniques in recognition of the importance of a connection between liquor retailers and the local community. As one example, they sometimes require a local liquor permit licensing body to examine the reputation or character of the license applicant. *See, e.g., PR Pub. LLC v. Iowa Alcoholic Beverages Div.*, 847 N.W.2d 613 (Iowa Ct. App. 2014) (discussing Iowa's licensure regime). These requirements promote the States' interest in evaluating the moral character of those permitted to sell a product that poses significant risks to the public health. *See Brown Distrib. Co., Inc. v. Oklahoma Alcoholic Beverage Control Bd.*, 597 P.2d 324, 327 (Okla. 1979).

Other States, like New York, consider local characteristics before granting an on-premises license, *see* N.Y. Alco. Bev. Cont. Law § 64(6-a), and have established a mechanism by which municipalities may "express an opinion for or against the granting of [an] application" for a liquor license, *id.* § 110-b(5). In New York City, a community board established pursuant to the city charter reviews these applications. *Id.* § 110-b(2)(b); N.Y. City Charter ch. 70 § 2800(a). In the rest of the State, the clerk of the village, town, or city receives notification and may provide his or her opinion on every application submitted for its locality. N.Y. Alco. Bev. Cont. Law §§ 110-b(2)(a), (5); *see also* Neb. Rev. Stat. Ann. § 53-131(2) (local governing body may submit recommendations for licensure).

These systems reflect the reality that the effects of excessive alcohol consumption, crime associated with the liquor market, and the dangers of illegally manufactured alcohol are felt first and most strongly in the local community. *See, e.g.*, *Leisy*, 135 U.S. at 123 (recognizing "the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks") (internal quotation marks omitted). As Judge Calabresi has explained, when the Twenty-first Amendment was ratified "the prevailing view of alcohol was that it was a unique product that posed unusual dangers, both directly as an intoxicant, and indirectly, as a stream of commerce that generated corruption and crime. It was therefore left to individual states to decide, in light of their own local values, needs, and experiences, how to contend with

that product." *Arnold's Wines*, 571 F.3d at 198 (Calabresi, J., concurring).

The need to foster a sense of responsibility for local conditions is especially acute when it comes to alcohol retailers, whether liquor store owners or tavern operators, for they are the final step in the path from the manufacturer to the consumer. *See* Pet. App. 50a (Sutton, J., dissenting) ("Because they form the final link in the distribution chain, retailers are closest to the local risks that come with selling alcohol, such as drunk driving, domestic abuse, and underage drinking.") (internal quotation marks and alterations omitted); *S. Wine & Spirits*, 731 F.3d at 811 (referring to the local risks of drunk driving, domestic abuse, and underage drinking). As Judge Sutton reasoned, "[r]equiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a (Sutton, J., dissenting).

II. States have adopted a wide variety of retail licensing systems, nearly all of which require residency.

With these interests in mind, the States have established comprehensive regulatory systems for the importation and distribution of alcohol to their residents. These systems, though built on the shared principles articulated above, are tailored to suit the particular needs of each State, whether large or small, rural or urban, alcohol-exporting or alcohol-importing. *See* N.Y. Alco. Bev. Cont. Law § 2 (States are best able to determine "whether public convenience and advantage will be promoted by the issuance

of licenses to traffic in alcoholic beverages," and on what terms); Fosdick & Scott, *Toward Liquor Control*, ch. 1 (lesson of Prohibition was that "it was a mistake to regard the United States as a single community in which a uniform policy of liquor control could be enforced").

The vast majority of States have enacted some form of a control or three-tier system, both of which typically impose residency or in-state presence requirements on retailers. For control States, the retailer is either a state agency or an agent of the State, and thus necessarily resides in-state and maintains its operations there. *See* Nat'l Alcohol Beverage Control Ass'n, Control State Directory and Info, https://tinyurl.com/y8mjvg8j; *see also, e.g.*, N.H. Rev. Stat. Ann. §§ 177:1, 177:9, 177:16; Utah Code Ann. §§ 32B-2-202(1), 32B-2-501.

Although it was common for States to fully control the distribution chain in the years immediately following Prohibition, many control States have since determined that their needs are better served in other ways and have transitioned to a partial control system, in which they control only certain aspects of the distribution chain. *See, e.g.*, *Ass'n of Washington Spirits & Wine Distrib. v. Washington State Liquor Control Bd.*, 340 P.3d 849, 851 (Wash. 2015) (partial control following 2011 voter referendum). In Virginia, for example, state stores remain the sole retailers of spirits, but beer and wine may be sold by private retailers that have resided in Virginia for at least a year. *See* Va. Code Ann. §§ 4.1-119, 207, 208, 222(B); *see also* Iowa Code Ann. §§ 123.22, 123.24 (modified control State); Mont. Code Ann. §§ 16-1-103, 16-1-106(2), 16-1-303(2) (modified control system over

wholesalers and retailers); 47 Pa. Cons. Stat. §§ 3-301, 4-403 (state-run liquor and beer retailers, but limited retail allowed at some licensed restaurants, hotels, and grocery and convenience stores).

Likewise, a significant number of States operating a three-tier system have chosen to require retailers to reside in-state, and often for a period of time prior to application. *See, e.g.*, Cal. Bus. & Prof. Code § 23961(c); Ga. Code Ann. § 3-4-23(a); Ind. Code. §§ 7.1-3-21-3, 7.1-3-21-5; Kan. Stat. Ann. § 41-311(b)(2); Ky. Rev. Stat. Ann. § 243.100(1)(f); La. Stat. Ann. § 26:80(A)(2); Md. Code Alco. Bev. § 4-109; Okla. Stat. tit. 37A, § 2-146; 47 Pa. Cons. Stat. § 4-403(b); Tenn. Code § 57-3-204(b)(2)(A); Va. Code Ann. § 4.1-222(B); Wis. Stat. Ann. § 125.04(5)(a)(2); Wyo. Stat. Ann. §§ 12-1-101(a), 12-4-103. The amount of time sufficient to obtain a license varies significantly among the States. Some, like South Carolina, are satisfied with 30 days of residency, *see* S.C. Code Ann. § 61-2-90; Wash. Rev. Code Ann. § 66.24.010(2)(a), while others require a period of several years, *see* Ind. Code. § 7.1-3-21-3 (five-year residency requirement); Okla. Stat. tit. 37A, § 2-146 (five-year residency requirement). These States, like Tennessee, have made the determination that long-term residents of the community should be the only ones dispensing liquor to their residents. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A).

Other States have instead chosen to focus only on the present and future residency of the owners, disposing with the durational aspect of the requirement. In those systems, so long as the owner currently resides in the State, he or she may obtain a license. *See, e.g.*, Ariz. Rev. Stat. Ann. § 4-202(A); Ark. Code

Ann. § 3-5-215; 235 ILCS 5/6-2(1); Mass. Gen. Laws Ann. ch. 135, § 15; Me. Rev. Stat. Ann. tit. 28-A § 1201(5)(B); Miss. Code Ann. § 67-3-19(a); Mo. Rev. Stat. § 311.060(1); N.C. Gen. Stat. Ann. § 18B-900; Neb. Rev. Stat. Ann. §§ 53-125(1), (3); R.I. Gen. Laws Ann. § 3-5-10(a)(1).

Another variation on these regulations is an in-state presence requirement for retail operations. Unlike the residency requirement, which ties the liquor license to the individual, the in-state presence requirement ties the license to the premises where the alcohol is sold. *See, e.g.*, 235 ILCS 5/5-1(d), 5/6-2(a)(10a). In Illinois, for example, a corporate retailer, though not required to be a resident of the State, must have a retail storefront in the State. *Id.* 5/7-14. These requirements are not mutually exclusive, and some States have opted for both presence and residency requirements. *See also* Ky. Rev. Stat. Ann. § 243.100(1)(f), 243.230; 47 Pa. Cons. Stat. §§ 4-403(b), 5-511; Va. Code. Ann. §§ 4.1-203(A), 222(B); Wis. Stat. Ann. §§ 125.04(5)(a)(2), (9). In those States, licenses are tied both to the person and to the premises.

In addition to residency and presence requirements, States have found other ways to tailor their regulatory systems to their specific needs. Some States, for example, impose dual licensing schemes whereby a retailer needs a municipal and a state license to operate. In Illinois, for example, a retailer must first obtain a license from the "city, village, or county" where the retail premises are located as a prerequisite to state licensure. *See* 235 ILCS 5/7-1(6); *see also* Md. Code Alcoholic Bev. § 1-201. And in Georgia, wine and malt-beverage retailers must have

a county or municipal license. Ga. Code. Ann. §§ 3-5-40, 3-6-40.

Yet another approach is for States to pair these residency or in-state presence requirements with corporate-form requirements, or a limitation on the number of licenses a person, corporation, or household may collect. The Oklahoma state constitution, for example, prohibits corporations and business trusts from holding retail package store licenses. Okla. Const. art. XXVIII-A, § 4; *see also* Kan. Stat. Ann. § 41-311(b)(6) (corporations ineligible for retailer licenses). In South Carolina, only one member of a household can hold a license, and there is a limit of three retail licenses per person. *See* S.C. Code Ann. §§ 61-6-130, 6-6-141. Rhode Island, for its part, will not issue certain licenses to a "chain store organization." R.I. Gen. Laws Ann. § 3-5-11(a).

Finally, certain States impose varying restrictions on the retail sale of different types of alcohol. Indiana, for instance, prohibits grocery stores, convenience stores, and drug stores from selling cold beer for carryout. *See* Ind. Code § 7.1-3-1-1.5(a)–(b); *see also, e.g.*, Conn. Gen. Stat. Ann. §§ 30-20, 30-36 (grocery stores may sell beer, whereas package stores and druggists may sell liquor and beer). Each of these systems, while differing in its details, is designed to ensure that retailers are selling safe liquor, distributed in a regulated market, to consumers. The systems, unlike the direct shipment bans invalidated in *Granholm*, do not discriminate against out-of-state *alcohol* or burden its interstate distribution; they focus instead on ensuring that liquor *retailers* are part of an orderly market, subject to control and oversight, and invested in the communities where they do

business. And the diversity of these systems did not come about by accident—it is the intended result of the second section of the Twenty-first Amendment's express grant of authority to the States.

III. Regardless of the validity of durational residency requirements, in-state presence requirements do not offend the dormant Commerce Clause.

For the reasons given above, durational residency requirements serve important state interests and fit comfortably within the power reserved to the States by the Twenty-first Amendment. But even if Tennessee's durational residency requirement were held invalid, state regimes mandating in-state presence would remain permissible. These presence requirements take a variety of different forms, *see supra* pp. 25–26, but each ties the availability of a retail license to the premises where alcohol is sold. Under Illinois law, for instance, each retail license covers only one location within the State where alcoholic liquor is to be offered for sale at retail, but Illinois does not regulate the residency of the applicant corporation or partnership. *See* 235 ILCS 5/5-1(d), 5/6-2(a)(10a), 5/7-14; *see also* Ky. Rev. Stat. Ann. §§ 243.100(1)(f), 243.230; 47 Pa. Cons. Stat. §§ 4-403(b), 5-511; Va. Code. Ann. §§ 4.1-203(A), 222(B); Wis. Stat. Ann. §§ 125.04(5)(a)(2), (9).

These state regulations requiring that retailers maintain an in-state presence do not run afoul of the dormant Commerce Clause. The focus of in-state presence requirements is the in-state distribution of alcohol, which is undoubtedly a core interest under the Twenty-first Amendment. *See North Dakota*, 495

U.S. at 423. When retailers sell to consumers from an in-state location, States can oversee and verify that the alcohol has travelled through the proper channels—from the manufacturer, to the distributor's in-state warehouse, to the in-state retailer who sells to the consumer. *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819, 821 (5th Cir. 2010).

Unlike the direct-shipping limitations at issue in *Granholm* that effectively precluded out-of-state products from entering those state markets, the in-state presence requirement does not discriminate against out-of-state producers or otherwise prevent them from participating in the state liquor market. 544 U.S. at 489. To the contrary, it permits the sale of all legal alcohol, so long as it is imported and distributed through authorized channels overseen by the State. *See Bridenbaugh*, 227 F.3d at 854 ("Wine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?").

Even the panel majority below recognized that these differences are important. According to the *Byrd* court, "requiring wholesalers and retailers to be in the state is permissible" because the "Twenty-first Amendment gives a state the power to oversee the alcoholic-beverages business," which includes regulating the distribution of alcoholic beverages in the State. Pet. App. 26a n.8, 27a.

In-state presence requirements promote the State interest in accountability and oversight discussed *supra* Section I.B, because "[s]tate officials can better enforce their regulations by inspecting the premises

and attaching the property of in-state entities." *Granholm*, 544 U.S. at 523 (Thomas, J., dissenting). As a practical matter, a State cannot inspect the premises of retailers that operate out of state with anything like the effectiveness of its inspections of in-state retailers. States simply do not have the resources to send regulators to the premises of every out-of-state retailer selling liquor to their consumers, either prophylactically or after a complaint arises.

In light of the distinction between presence requirements and durational-residency requirements, even if this Court finds that durational residency requirements are invalid, it should reaffirm the viability of presence requirements for liquor retailers.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois
DAVID L. FRANKLIN*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
SARAH A. HUNGER
BRIDGET DIBATTISTA
BENJAMIN F. JACOBSON
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
dfranklin@atg.state.il.us

* *Counsel of Record*

STEVE MARSHALL
Attorney General of
Alabama
501 Washington Avenue
Montgomery, AL 36130

LESLIE RUTLEDGE
Attorney General of
Arkansas
323 Center Street
Little Rock, AR 72201

CYNTHIA H. COFFMAN
Attorney General of
Colorado
1300 Broadway
Denver, CO 80203

GEORGE JEPSEN
Attorney General of
Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General of
Delaware
820 North French Street
Wilmington, DE 19801

KARL A. RACINE
Attorney General of the
District of Columbia
One Judiciary Square
Washington, DC 20001

PAMELA JO BONDI
Attorney General of
Florida
PL-01, The Capitol
Tallahassee, FL 32399

CHRISTOPHER M. CARR
Attorney General of
Georgia
40 Capitol Square SW
Atlanta, GA 30334

LAWRENCE G. WASDEN
Attorney General of
Idaho
700 W. Jefferson Street
Boise, ID 83720

CURTIS T. HILL, JR.
Attorney General of
Indiana
200 West Washington St.
Indianapolis, IN 46204

TOM MILLER
Attorney General of
Iowa
1305 E. Walnut Street
Des Moines, IA 50319

DEREK SCHMIDT
Attorney General of
Kansas
120 SW 10th Avenue
Topeka, KS 66612

ANDY BESHEAR
Attorney General of
Kentucky
700 Capital Avenue
Frankfort, KY 40601

JEFF LANDRY
Attorney General of
Louisiana
1885 North Third Street
Baton Rouge, LA 70802

MAURA HEALEY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

BILL SCHUETTE
Attorney General of
Michigan
P.O. Box 30212
Lansing, MI 48909

JIM HOOD
Attorney General of
Mississippi
550 High Street
Jackson, MS 39201

TIM FOX
Attorney General of
Montana
215 N. Sanders Street
Helena, MT 59601

DOUG PETERSON
Attorney General of
Nebraska
2115 State Capitol
Lincoln, NE 68509

BARBARA D. UNDERWOOD
Attorney General of New
York
28 Liberty Street
New York, NY 10005

JOSHUA H. STEIN
Attorney General of
North Carolina
9001 Mail Service Center
Raleigh, NC 27699

WAYNE STENEHJEM
Attorney General of
North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505

MICHAEL DEWINE
Attorney General of
Ohio
30 E. Broad Street
Columbus, OH 43215

MIKE HUNTER
Attorney General of
Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

JOSH SHAPIRO
Attorney General of
Pennsylvania
Strawberry Square
Harrisburg, PA 17120

ALAN WILSON
Attorney General of
South Carolina
1000 Assembly Street
Columbia, SC 29201

KEN PAXTON
Attorney General of
Texas
300 W. 15th Street
Austin, TX 7801

THOMAS J. DONOVAN, JR.
Attorney General of
Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General of
Washington
1125 Washington St. SE
Olympia, WA 98504

BRAD SCHIMEL
Attorney General of
Wisconsin
114 East State Capitol
Madison, WI 53702

PETER F. KILMARTIN
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

MARTY J. JACKLEY
Attorney General of
South Dakota
1302 US-14 #1
Pierre, SD 57501

SEAN D. REYES
Attorney General of
Utah
350 N. State Street
Salt Lake City, UT 84114

MARK R. HERRING
Attorney General of
Virginia
202 North 9th Street
Richmond, VA 23219

PATRICK MORRISEY
Attorney General of West
Virginia
State Capitol Complex,
Bldg. 1, Room E-26
Charleston, WV 25305